TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. [redacted]63.

THE DISCONTO GESELLSCHAFT, PLAINTIFF IN ERROR

vs.

AUGUSTUS C. UMBREIT.

IN ERROR TO THE CIRCUIT COURT OF MILWAUKEE COUNTY (BRANCH No. 1), STATE OF WISCONSIN.

FILED JULY 11, 1908.

(20,205.)

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SUPREME COURT OF THE UNITED STATES.

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vs.

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IN ERROR TO THE CIRCUIT COURT OF MILWAUKEE COUNTY (BRANCH No. 1), STATE OF WISCONSIN.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal U. S. Circuit Court, Eastern District of Wisconsin.]

The President of the United States of America, to the Judges of the Circuit Court of the State of Wisconsin for the County of Milwaukee, Branch No. 1, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the state of Wisconsin for the county of Milwaukee, before you, between The Disconto Gesellschaft, plaintiff, and Augustus C. Umbreit, intervenor, said judgment having been entered pursuant to the mandate and direction of the supreme court of the state of Wisconsin, being the highest court of said state, wherein was drawn in question the construction of a clause of the constitution of the United States and of a treaty or treaties between the United States and the Kingdom of Prussia and the decision was against the title, right, privilege or exemptions specially set up or claimed under such clause of said constitution and under said treaty or treaties, and manifest error hath happened to said The Disconto Gesellschaft, plaintiff, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf. You are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington in the District of Columbia on the 19th day of July next in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said
2 Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 19th day of June, in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirtieth.

EDWARD KURTZ,
Clerk, U. S. Circuit Court, Eastern Dist. of Wisconsin.

To the Supreme Court of the United States:

The return of the Judges of the Circuit Court of the State of Wisconsin for the County of Milwaukee Branch No. 1 to the within Writ of Error appears by the annexed Schedules.

[Seal Circuit Court, Milwaukee Co., Wisconsin.]

A. A. WIEBER,
Clerk of the Circuit Court of the State of Wisconsin for the County of Milwaukee, Branch No. 1.

Attest:
LAWRENCE W. HALSEY,
Judge of said Court.

3 [Endorsed:] United States of America, *ss.* The Disconto Gesellschaft, Plaintiff in Error, *vs.* Augustus C. Umbreit, Defendant in Error. Writ of Error. Service admitted June 19, 1906. Augustus C. Umbreit, Def't in Error. Served and filed Jun- 19, 1906. A. A. Wieber, Clerk. Winkler, Flanders, Smith, Bottum & Fawsett, Attorneys at Law, Milwaukee, Wis., Telephone Main 78.

4 UNITED STATES OF AMERICA, *ss:*

To Augustus C. Umbreit, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 19th day of July next, pursuant to a writ of error filed in the office of the clerk of the circuit court of the state of Wisconsin for Milwaukee County, wherein The Disconto Gesellschaft is plaintiff in error and Augustus C. Umbreit is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 19th day of June, A. D. 1906.

LAWRENCE W. HALSEY,
Judge of the Circuit Court of the State of Wisconsin for the County of Milwaukee, Branch No. 1.

5 [Endorsed:] United States of America, *ss.* The Disconto Gesellschaft, Plaintiff in Error, *vs.* Augustus C. Umbreit, Defendant in Error. Citation. Service admitted June 19, 1906. Augustus C. Umbreit, Def't in Error. Filed Jun- 19, 1906. A. A. Wieber, Clerk. Winkler, Flanders, Smith, Bottum & Fawsett, Attorneys at Law, Milwaukee, Wis., Telephone Main 78.

6 STATE OF WISCONSIN:

Circuit Court, Milwaukee County, Branch No. 1.

THE DISCONTO GESELLSCHAFT, Plaintiff,
vs.
GERHARD TERLINDEN, Defendant; THE FIRST NATIONAL BANK, Garnishee; AUGUSTUS C. UMBREIT, Intervenor.

Judgment rendered May 15, 17, 1906, pursuant to the mandate and direction of the Supreme Court of the State of Wisconsin, directing payment of the sum of $6969.47 and accrued interest thereon, now in custody of the clerk of this court, to the intervenor, Augustus C. Umbreit, and for costs in favor of said intervenor against the above plaintiff.

Now comes the above named plaintiff, The Disconto Gesellschaft, and shows to the court that the above named court entered judgment in the above entitled action in favor of the intervenor, Augustus C. Umbreit, and against this plaintiff, in which judgment and the proceedings in said cause prior thereunto certain grievous errors were

committed to the great damage and prejudice of this plain-
7 tiff, all of which errors more in detail appear in the assign-
ment of errors filed herewith; and that said judgment was entered by said Circuit Court pursuant to the decision and direction of the Supreme Court of the State of Wisconsin rendered upon an appeal in said cause, and that the record of the proceedings in said Supreme Court and its decision in said cause have been remitted to said Circuit Court.

And this plaintiff prays that a writ of error may be allowed in its behalf to issue out of the Supreme Court of the United States to said Circuit Court of Milwaukee County to remove the record and proceedings and all things concerning the same in said cause, including the decision of the Supreme Court of the State of Wisconsin therein, to said Supreme Court of the United States and for the correction of the errors so complained of and the reversal of said judgment therein mentioned and for judgment in favor of this plaintiff.

And your petitioner will ever pray etc.

Dated June 1st, 1906.

THE DISCONTO GESELLSCHAFT,
By WINKLER, FLANDERS, SMITH, BOTTUM & FAWSETT, *Its Attorneys.*

F. C. WINKLER,
Of Counsel.

The writ of error above prayed for is hereby allowed.

JNO. B. WINSLOW,
Justice of the Supreme Court of the State of Wisconsin.

Dated June 18th, 1906.

8 STATE OF WISCONSIN:

Circuit Court, Milwaukee County, Branch No. 1.

THE DISCONTO GESELLSCHAFT, Plaintiff,
vs.
GERHARD TERLINDEN, Defendant; THE FIRST NATIONAL BANK, Garnishee; AUGUSTUS C. UMBREIT, Intervenor.

Judgment rendered May 15, 1906, pursuant to the mandate and direction of the Supreme Court of the State of Wisconsin, directing payment of the sum of $6969.47 and accrued interest thereon, now in custody of the clerk of this court, to the intervenor, Augustus C. Umbreit, and for costs in favor of said intervenor against the above plaintiff.

Assignment of Errors.

On the 1st day of June, 1906, comes the plaintiff above named and says, that in the record and proceedings in this cause there is manifest error, inasmuch as,

First. Error was committed in that judgment was given in favor of the intervenor and against said plaintiff awarding to said intervenor the sum of six thousand nine hundred sixty nine and 47/100 dollars ($6969.47) and interest accrued thereon on deposit in this court, on the ground that although said plaintiff had
9 acquired a lien thereon by garnishment long prior to the accrual of the claim on the part of said intervenor, said plaintiff was not entitled to such lien as against said intervenor by reason of said plaintiff being a resident and subject of the Kingdom of Prussia, and said intervenor a resident and citizen of the state of Wisconsin, whereas, by virtue of certain treaties between the United States and the Kingdom of Prussia, viz: a treaty concluded in 1828 and a treaty concluded in 1799, said plaintiff was and is entitled to the full protection of the laws of the state of Wisconsin in the matter of its suit and proceedings against Gerhard Terlinden equally with a resident of Wisconsin, as is claimed in this action and appears of record; said judgment having been so rendered upon the final decision and direction of the Supreme Court of the State of Wisconsin.

Second. Error was committed in awarding to said intervenor the said sum of money on deposit in court in payment of an alleged judgment obtained by said intervenor against said Gerhard Terlinden, as constituting a lien upon said fund, which said judgment was obtained and rendered without jurisdiction, without notice to or service of process upon said Gerhard Terlinden, and without notice to or process served upon the plaintiff herein, although such plaintiff at the time of the commencement of his action by said intervenor had a valid lien on said fund by virtue of garnishment and of a judgment against said Terlinden theretofore duly obtained for more than the full amount of said fund, said alleged judgment depriving this plaintiff of its property without due process of law, in violation of the constitution of the United States, which was duly claimed by said plaintiff and appears of record, such awarding of said sum being by and pursuant to the final decision and direction of the Supreme Court of Wisconsin.

WINKLER, FLANDERS, SMITH, BOTTUM & FAWSETT, *Attorneys for said Plaintiff.*

F. C. WINKLER,
Of Counsel.

10 [Endorsed:] State of Wisconsin, Circuit Court, Milwaukee County, Branch No. 1. The Disconto Gesellschaft, Plaintiff, *vs.* Gerhard Terlinden, Defendant, The First National Bank, Garnishee, Augustus C. Umbreit, Intervenor. Petition for Writ of Error and Assignment of Errors. Allowance of Writ of Error. Original. Filed Jun- 19 1906 A. A. Wieber, Clerk. Winkler, Flanders, Smith, Bottum & Fawsett, Attorneys at Law, Milwaukee, Wis. Telephone Main 78.

11 STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff and Plaintiff in Error,
vs.
AUGUSTUS C. UMBREIT, Intervenor and Defendant in Error.

Know all men by these present that we, The Disconto Gesellschaft of Berlin, Germany, as principal, and United States Fidelity & Guaranty Company, a corporation organized under the laws of the state of Maryland, and duly authorized by law to do business in the state of Wisconsin as a surety company, are held and firmly bound unto the above named Augustus C. Umbreit in the sum of One Thousand Dollars ($1,000), to be paid to the said Augustus C. Umbreit, for the payment of which, well and truly to be made, we bind ourselves and each of us and our successors, jointly and severally, firmly by these presents

Sealed with our seals and dated the 19th day of June, 1906.

Whereas, the above named The Disconto Gesellschaft has prosecuted a writ of error to the supreme court of the United States, to reverse the judgment rendered in the above entitled suit by the circuit court of the state of Wisconsin for the county of Wilwaukee, Branch No. 1, in pursuance of a mandate of the supreme court of the state of Wisconsin,

Now therefore, the condition of this obligation is such that if the above named The Disconto Gesellschaft shall prosecute said writ of error to effect and answer all damages and costs, if said The
12 Disconto Gesellschaft fail to make said plea good, then this obligation shall be void, otherwise in full force and virtue.

[Seal The United States Fidelity & Guaranty Company, Incorporated 1896.]

THE DISCONTO GESELLSCHAFT,
By WINKLER, FLANDERS, SMITH, BOTTUM & FAWSETT,
Its Attorneys.
THE UNITED STATES FIDELITY AND GUARANTY CO.,
By EDW. P. HACKETT, *Its Att'y in Fact.*

A writ of error having been filed to remove the cause mentioned in the above bond to the Supreme Court of the United States, said bond is hereby accepted and approved as a supersedeas upon the judgment in said case, and execution and payment of said judgment is hereby stayed until said writ of error shall be finally disposed of.

Dated June 19th, 1906.

LAWRENCE W. HALSEY,
Circuit Judge for the State of Wisconsin for the County of Milwaukee, Branch No. 1.

13 STATE OF WISCONSIN, *Department of Insurance:*

The United States Fidelity & Guaranty Company, located at Bal more, in the state of Maryland, having furnished to the undersign Commissioner of Insurance due proof of its possessing the qualifi tions required by the laws of the State of Wisconsin relating Suretyship Corporations, and having complied with said laws,

Now therefore, This is to Certify that said United States Fidelity Guaranty Company, has qualified and is authorized to transa within this state the business of a suretyship corporation under t Statutes of this State until the first day of March, A. D. 1907, unl this certificate be sooner revoked.

Witness my hand and official seal at Madison, Wisconsin, th 10th day of Feb'y, A. D. 1906.

[SEAL.] ZENO M. HOST,
Commissioner of Insurance.

I, Zeno M. Host, Commissioner of Insurance of the State of W consin, hereby certify that I have compared the foregoing co with the original certificate of authority, number 88, issued to t United States Fidelity & Guaranty Company, and on file in th department, and that the same is a true copy of said original and the whole thereof.

Witness my hand and official seal at Madison, Wisconsin, th 30th day of May, A. D. 1906.

[SEAL.] ZENO M. HOST,
Commissioner of Insurance.

14 [Endorsed:] State of Wisconsin, Circuit Court, Milwauk County. The Disconto Gesellschaft, Pl't'ff and Pl't'ff Error, *vs.* Augustus C. Umbreit, Intervenor and Defendant in Erro Supersedeas Bond. Service admitted June 19, 1906. Augustus Umbreit, Def't in Error. Filed Jun- 19, 1906. A. A. Wieber, Cler Winkler, Flanders, Smith, Bottum & Fawsett, Attorneys at La Milwaukee, Wis., Telephone Main 78.

15 STATE OF WISCONSIN, *Milwaukee County, ss:*

I hereby certify that at the City of Milwaukee in the County Milwaukee and State of Wisconsin, I served the within affidavit an summons in garnishment as follows:

On the within named garnishee, the First National Bank of Mi waukee on the 17th day of August, 1901 at the hour of 12:35 o'cloc P. M., by then and there delivering to and leaving with Frank Bigelow, the president of said garnishee, the First National Ban of Milwaukee, a true copy of said affidavit and summons, on whic I endorsed the date of service, my name and official title, on th within named garnishee the Marine National Bank of Milwaukee o said 17th day of August, 1901, at the hour of 12:42 P. M., by the and there delivering to and leaving with Washington Becker, th president of said garnishee, the Marine National Bank of Milwauke

true copies thereof, on which I endorsed the date of service, my name and official title; on the within named garnishee The Milwaukee Trust Company of Milwaukee on the 17th day of August, 1901, at the hour of 12:35 o'clock P. M., by then and there delivering to and leaving with Frank G. Bigelow, the president of said garnishee, The Milwaukee Trust Company of Milwaukee, true copies thereof, on which I endorsed the date of service, my name and official title; and on the within named garnishee, the Merchants Loan & Safe Deposit Co., on said 17th day of August, 1901, at the hour of 6:55 P. M., by then and there delivering to and leaving with Edward P. Hackett, the president of said garnishee, the Merchants Loan & Safe Deposit Co., true copies of said affidavit and summons in garnishment, on which I endorsed the date of service, my name and official title.

I further certify that after due diligent search and inquiry the within named defendant, Gerhard Terlinden, alias Theodor Graefe, cannot be found within this State, and that service of said affidavit and summons in garnishment cannot be made within this State upon him, and that from information received (which information I believe to be true) said defendant is not a resident of the State of Wisconsin, and is not now within said State of Wisconsin.

I further certify that in said City and County aforesaid, on the 19th day of August, 1901, at the hour of 5:30 P. M., I served the within affidavit and summons in garnishment on A. C. Umbreit, the attorney of the within named defendant, Gerhard Terlinden, alias Theodor Graefe, said Umbreit being an attorney at law, and having appeared in the above entitled action, and in the principal action as such for said defendant, by then and there delivering to and leaving with said A. C. Umbreit true copies of said affidavit and summons in garnishment, on which I endorsed the date of service, my name and official title.

THEODORE ZILLMER, *Sheriff*,
By P. J. GOOTEMAAT, *Deputy*.

Milwaukee, August 23rd, 1901.

Service	$2.00
Travel	1.00
Copies	1.20
Ret	25
	$4.45

Filed Sept. 11, 1901.

G. RINGENOLDUS, *Clerk*.

16 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,
vs.
GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, and THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN & SAFE DEPOSIT CO., Garnishees.

STATE OF WISCONSIN, *Milwaukee County, ss:*

Charles E. Wild, being first duly sworn, deposes and says that he is the agent of the above named plaintiff, and makes this affidavit on its behalf and by its authority; that said plaintiff is a foreign corporation doing business at Berlin, Prussia; that the above entitled action has been commenced and is now pending, and is an action to recover damages founded upon a cause of action mentioned in Section 2731 of the Revised Statutes of Wisconsin of 1898, to-wit: a cause of action sounding in tort existing in favor of the plaintiff and against the defendant, and that the damages sustained and claimed exceed the sum of fifty dollars ($50), to-wit: the sum of twenty-five thousand dollars ($25,000), and that the defendant is not a resident of the State of Wisconsin; that the amount of the plaintiff's claim in said action against the said defendant, over and above all offsets, is the sum of twenty-five thousand dollars ($25,000); that deponent verily believes that the First National Bank of Milwaukee, the Marine National Bank of Milwaukee (Each a corporation organized and existing under the laws of the United States of America), and the Milwaukee Trust Company and the Merchants' Loan & Safe Deposit Co. (each a corporation existing under the laws of the State of
17 Wisconsin), are indebted to or have property, real or personal, in their possession or under their control belonging to the said defendant, Gerhard Terlinden, alias Theodor Graefe, and that the indebtedness and property aforesaid, or either, are, to the best of the knowledge and belief of this affiant, not by law exempt from seizure or sale upon execution.

CHARLES E. WILD.

Subscribed and sworn to before me this 17th day of August, A. D. 1901.

[SEAL.] JOHN H. HURLEY,
Notary Public, Milwaukee Co., Wis.

My commission expires Aug. 8, 1904.

Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,
vs.
GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, and THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT CO., Garnishees.

Summons.

The State of Wisconsin to the said Garnishees, and each of them:

You are hereby summoned, pursuant to the annexed affidavit, as garnishee of the defendant Gerhard Terlinden, alias Theodor Graefe, and required, within twenty days after the service of this summons upon you, exclusive of the day of service, to answer according to law whether you are indebted to, or have in your possession or under your control any property, real or personal, belonging to such defendant, and to serve a copy of your answer on the undersigned at their office in the city of Milwaukee, in the county of Milwaukee; and in case of your failure so to do, you will be liable to further proceedings according to law. Of which the said defendant will also take notice.

WINKLER, FLANDERS, SMITH,
BOTTUM & VILAS,
Plaintiff's Attorneys.

P. O. Address, Rooms 800-811 Pabst Bldg., Milwaukee, Milwaukee County, Wisconsin.

18 [Endorsed:] Circuit Court, Milwaukee County. The Disconto Gesellschaft, Plaintiff, *vs.* Gerhard Terlinden alias Theodor Graefe, Defendant, The First National Bank of Milwaukee, *et al.*, Garnishees. Summons and Affidavit in Garnishment. Filed Sep. 11, 1901 G. Ringenoldus, Clerk. Winkler, Flanders, Smith, Bottum & Vilas, Attorneys at Law, Milwaukee, Wis. Telephone Main 78.

19 [Form No. 105.]

Notice of Retainer and Demand of Copy of Complaint.

Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,
against
GERHARD TERLINDEN, alias THEODORE GRAEFE, Defendant, & FIRST NATIONAL BANK OF MILWAUKEE, MARINE NATIONAL BANK OF MILWAUKEE, MILWAUKEE TRUST CO. OF MILWAUKEE, & MERCHANTS' LOAN & SAFE DEPOSIT CO., Garnishees.

Please take notice, That I am retained by and appear for the defendant Gerhard Terlinden, alias Theodore Graefe in the above enti-

tled action, and I demand that a copy of the plaintiff's complaint therein be served upon me at my office, 505 Germania Bld. in the City of Milwaukee.

Yours, &c.,

A. C. UMBREIT,
Attorney for Defendant.

Dated August 19th, 1901.

To Winkler, Flanders, Smith, Bottum & Vilas, Attorneys for Plaintiff.

20 [Endorsed:] Circuit Court Milwaukee County. The Disconto Gesellschaft Pl'ff *vs.* Gerhard Terlinden (alias) — Def't First Nat. Bank *et al.* Garnishees Notice of Appearance and Demand of Copy of Complaint. (Copy) Due service of the within notice and demand admitted this 19 day of August A. D. 1901. W. F. S. B. & V. Plaintiff Attorney-. Filed Sep. 5, 1901 G. Ringenoldus Clerk.

21 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,
vs.
GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY, and THE MERCHANTS' LOAN AND — DEPOSIT COMPANY, Garnishees.

The above named defendant, Gerhard Terlinden, alias Theodor Graefe, for special answer to the affidavit in the above entitled action on which the garnishee summons in said action was issued and which affidavit is annexed to said summons, denies the existence, at the time of the making of such affidavit, of the facts stated in said affidavit, as ground for said summons, that is to say: The defendant denies that, at the time of making of said affidavit, said defendant was not a resident of the State of Wisconsin.

Wherefore defendant demands judgment that said garnishee action be dismissed with costs.

GERHARD TERLINDEN,
By A. C. UMBREIT, *His Attorney.*

STATE OF ILLINOIS, *Cook County, ss:*

Gerhard Terlinden, alias Theodor Graefe, being first duly sworn, says that he is the defendant in the above entitled action; that he has read the above and foregoing special answer and knows the contents thereof and that the same is true to his own knowledge.

GERHARD TERLINDEN.

Subscribed and sworn to before me this 26th day of September, 1901.

[SEAL.]

W. S. ELLIOTT, JR.,
Notary Public, Cook Co., Ill.

22 [Endorsed:] Copy. Circuit Court, Milwaukee County. The Disconto Geselschaft, Plaintiff, *vs.* Gerhard Terlinden, Defendant. First Nat. Bank, *et al.* Garnishees. Special Answer. A. C. Umbreit, Att'y for Def't. 9/27/1901 Filed Sep. 27, 1901. G. Ringenoldus, clerk.

23 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,

vs.

GERHARD TERLINDEN, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE,, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY, and THE MERCHANTS' LOAN AND — DEPOSIT COMPANY, Garnishees.

Please take notice, that I am retained by and appear for the defendant Gerhard Terlinden, in the above entitled action and I demand that a copy of all papers and notices herein be served on me at my office, 505 Germania Building, Milwaukee, Milwaukee, Wisconsin.

Yours, etc.,

A. C. UMBREIT,
Att'y for Def. Terlinden.

Dated this 24th day of August, 1901.

To Miller, Noyes & Miller,, Turner, Pease & Turner, Hoyt & Olwell Attorneys for Garnishee Defendant. The Merchants Loan & Deposit Co. The First National Bank, The Milwaukee Trust Co. The Marine National Bank.

Filed Sept. 5, 1901.

G. RINGENOLDUS, *Clerk.*

24 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,

vs.

GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, and THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN & SAFE DEPOSIT CO., Garnishees.

STATE OF WISCONSIN, *Milwaukee County, ss:*

F. J. Kipp, being first duly sworn, deposes and says that he is cashier of the above named garnishee, The First National Bank of Milwaukee, and makes this affidavit for and on behalf of said

garnishee, because it is a corporation and that he is duly authorized so to do; that on the 17th day of August 1901, the above named garnishee was served with a summons in the above entitled action. That said garnishee was not at the time of the service of the garnishee summons, and has not since become indebted, or under any liability to the defendant named in the garnishee summons, in any manner or upon any account, except as hereinafter stated; That said garnishee did not hold at the time of the service of the garnishee summons, and since that date has not held and now does not hold the title or possession of any real estate, or any interest in land of any description, or of any personal property, effects or credits, or any instruments or papers relating to any such, belonging to the defendant or in which he has in any wise interest except as hereinafter stated:

25 That on or about the 8th day of August A. D. 1901, a person unknown to this deponent and to said First National Bank of Milwaukee, who called himself Theodor Grafe, deposited with said bank bank notes for twenty thousand (20,000) marks German money, and for which said First National Bank delivered to said person Savings Bank Book No. 30913 and entered upon such savings book to the credit of said Theodor Grafe the equivalent of twenty thousand (20000) marks, to-wit: four thousand seven hundred twenty dollars ($4720); that thereafter, on or about the 14th day of August, 1901, the same person called again at said bank and made another deposit of seventeen hundred dollars ($1700), which was credited in said Savings Bank Book No. 30913, so that at the date of service of said garnishment process this bank had on deposit in the Savings Department six thousand four hundred twenty dollars ($6420) standing in the name of Theodor Grafe, but whether the same is the property of Theodor Grafe or whether Theodor Grafe is the same person as Gerhard Terlinden or the same person as Theodor Graefe, the defendant in this action this deponent has no knowledge sufficient to form a belief and therefore submits all the facts to the court.

That simultaneously with the service of the garnishee process in this action said garnishee was served with an affidavit and summons in garnishment in the following two actions in the Circuit Court for Milwaukee, to-wit: (1) Robert Suermont *vs.* Gerhard Terlinden alias Theodor Graefe, The First National Bank, garnishee, in which affidavit for garnishment twenty-five thousand dollars ($25000) is alleged to be due from the said defendants to the said plain-

26 tiff; (2) The Amsterdamsche Bank *vs.* Gerhard Terlinden alias Theodor Graefe, The First National Bank, garnishee, in which affidavit for garnishment twenty-five thousand dollars ($25000) is alleged to be due from the said defendants to the said plaintiff.

F. J. KIPP.

Subscribed and sworn to before — this 3rd day of September, 1901.

[SEAL.] H. G. GOLL,
Notary Public, Milwaukee County, Wisconsin.

My commission expires, Jan. 30th, 1905.

27 [Endorsed:] Circuit Ct. Mil. Co. The Disconto Gesellschaft, Pl'ff *vs.* Gerhard Terlinden alias Theodor Graefe Def't The First Nat'l Bank of Mil. *et al.* garnishees. Answer of The First Nat'l Bank. Copy. Sept. 3/1901. Filed Sep. 3, 1901 G. Ringenoldus Clerk. Miller, Noyes & Miller.

28 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,

vs.

GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, and THE MERCHANTS' LOAN & SAFE DEPOSIT CO., Garnishees.

To Miller, Noyes & Miller, Attorneys for The First National Bank of Milwaukee, the above named Garnishee:

You will please take notice that the plaintiff above named elects to take issue, and does hereby take issue, on the answer made and served on the plaintiff's attorneys on the 3d day of September, 1901, by the said The First National Bank of Milwaukee, garnishee as aforesaid, to the garnishee summons heretofore served in the above entitled matter. And the said plaintiff will maintain that the said The First National Bank of Milwaukee, notwithstanding its said answer, is liable as garnishee of said defendant, as provided by law.

Dated, Milwaukee, September 20th, A. D. 1901.

Yours, &c.,

WINKLER, FLANDERS, SMITH, BOTTUM & VILAS,
Plaintiff's Attorneys.

29 [Endorsed:] Circuit Court, Milwaukee County. The Disconto Gesellschaft, Plaintiff, *vs.* Gerhard Terlinden, alias, &c., Defendant, The First National Bank of Milwaukee *et al.*, Garnishees. Issue on Answer of The First National Bank of Milwaukee. (Copy.) Filed Oct. 8, 1901, A. A. Wieber, Clerk.

30 STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,

vs.

GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees.

THE AMSTERDAMISCHE BANK, Plaintiff,

vs.

GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees.

ROBERT SUERMONT, Plaintiff,

vs.

GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees.

On reading and filing the affidavit of Augustus C. Umbreit hereto annexed and upon the record, papers on file and proceedings had in the above entitled actions, and each of them, and on motion of Joseph B. Doe, attorney for said Augustus C. Umbreit, it is hereby

Ordered that the above named plaintiffs, and each of them, do show cause, on the 26th day of September, 1903, before said Court, in the branch thereof presided over by Hon. Orren T. Williams, Circuit Judge, at the opening of Court on that day or as soon thereafter as counsel can be heard, at the Court House, in the City of Milwaukee, Milwaukee County, Wisconsin, why an order
31 should not be made bringing in said Augustus C. Umbreit as a party defendant in and to the above entitled actions, and each of them; and it is further

Ordered that a copy of this order and of said affidavit be served upon Messrs. Winkler, Flanders, Smith, Bottum & Vilas, attorneys for the above named plaintiffs, and each of them, on or before the 24th day of September, 1903.

Dated this 24th day of September, 1903.

By the Court,

WARREN D. TARRANT,
Circuit Judge.

32 STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,

vs.

GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees.

THE AMSTERDAMISCHE BANK, Plaintiff,

vs.

GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees.

ROBERT SUERMONT, Plaintiff,

vs.

GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees.

STATE OF WISCONSIN, *Milwaukee County, ss:*

Augustus C. Umbreit being first duly sworn, on oath says that he is and has been ever since the year 1883 a citizen of the State of Wisconsin and of full age; that ever since said date, he has and still does reside in the City of Milwaukee, Milwaukee County, Wisconsin; that he is an attorney at law and a member of the bar of said Court.

That on or about the 26th day of May, 1903, an action was duly commenced in said Court, in which said action this affiant was plaintiff and the above named defendant, Gerhard Terlinden, was defendant.

That in said action and on the 11th day of September, 1903, judgment was duly rendered and entered in favor of this affiant
33 and against said Gerhard Terlinden, for the sum of seven thousand five hundred and twenty five ($7525.00) dollars, and that no part of said judgment has been paid.

That at the time of the commencement of said action by the issuing of the summons therein, a garnishee affidavit and summons was duly made, issued and served upon the above named garnishees, The First National Bank of Milwaukee and The Marine National Bank of Milwaukee.

That in said garnishee action, each of said garnishees have made

answer, pursuant to the statute; that a copy of the answer of the garnishee, The First National Bank of Milwaukee, is hereto annexed, marked Exhibit "A" and made a part of this affidavit; that a copy of said answer of said garnishee, The Marine National Bank of Milwaukee, is hereto annexed, marked Exhibit "B" and made a part of this affidavit.

That the plaintiffs in the above entitled action, and each and all of them, were, at the time of the commencement of said above entitled actions respectively and still are non-residents of the State of Wisconsin and residents of a foreign country, to-wit: The Disconto Gesellschaft and Robert Suermont are and were residents of the City of Berlin, in the Empire of Germany, and The Amsterdamische Bank is and was a resident of the Kingdom of Netherlands.

That on the 27th day of July, 1901, at Oberhausen, Rhine Province German Empire, certain proceedings were had in the Courts of said Country, wherein and whereby said defendant, Gerhard Terlinden, was duly declared a bankrupt, in which proceeding one Paul Hecking was duly appointed trustee in bankruptcy for the estate and property of said Terlinden, and, as affiant is informed and believes, said Hecking is still such trustee.

That in such bankruptcy proceedings and before the commencement of any of the above entitled actions or the issuing of the garnishee process therein or the commencement of any action by said plaintiffs, or any of them, against said Terlinden in any of the Courts of this State, the above named plaintiffs, and each of them, duly filed their claims against said Terlinden with said trustee in bank-
34 ruptcy and submitted to the jurisdiction of said courts of the German Empire and participated in the proceedings in said matter had therein.

That said claims so filed in said bankruptcy proceedings were and are the identical claims upon which the above entitled actions are based respectively.

That section 14 of the bankruptcy law of said German Empire and a correct translation thereof is hereto annexed, marked Exhibit "C" and made a part of this affidavit.

Affiant further says that by reason of the matters and things herein set forth, this affiant claims a prior and superior right and lien to and upon the funds in the hands of said garnishees, The First National Bank of Milwaukee and The Marine National Bank of Milwaukee, and the indebtedness due to said defendant, Gerhard Terlinden, from said garnishees, The First National Bank of Milwaukee and The Marine National Bank of Milwaukee, as appears from their answers as garnishees respectively, copies of which are hereunto annexed.

Affiant further says that he is informed and verily believes that a complete determination of the controversy in the above entitled actions, and each of them, cannot be had without the presence of this affiant as a party to said actions, and each of them, and that this affiant, who is not now a party to said actions, or any of them, has such interest in the subject matter of the controversy, in said actions, and each of them, as requires him to be made a party thereto, for his

due protection, and affiant makes this affidavit for the purpose of moving said Court for an order directing him to be brought in as a party defendant in said actions, and each of them.

A. C. UMBREIT.

Subscribed and sworn to before me this 22nd day of September, 1903.

MAMIE E. HUGHES,
Notary Public, Milwaukee County, Wisconsin.

Filed July 7, 1905.
A. A. WIEBER, *Clerk.*

35 EXHIBIT "A."

Circuit Court, Milwaukee County.

AUGUSTUS C. UMBREIT, Plaintiff,
vs.
GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, WIS., and THE MARINE NATIONAL BANK OF MILWAUKEE, WIS., Garnishees.

STATE OF WISCONSIN, *Milwaukee County, ss:*

Frank J. Kipp being first duly sworn deposes and says that he is the cashier of the above named garnishee, the First National Bank of Milwaukee, and makes this affidavit for and on behalf of said garnishee, being duly authorized so to do.

That on the 27th day of May, 1903, the above named garnishee was served with a garnishee summons in the above entitled action; that said garnishee was not, at the time of the service of the garnishee summons and has not since become, indebted or under any liability to the defendant named in the garnishee summons in any manner or upon any account, except as hereinafter set forth.

That said garnishee did not hold, at the time of the service of the garnishee summons and since that date has not held and now does not hold, the title or possession of any real estate or any interest in land of any description or any personal property, effects or credits or any instruments or papers relating to any such belonging to the defendant or in which he has any interest, except as hereinafter stated.

That on or about the 9th day of August, 1901, a person unknown to this deponent and to said First National Bank of Milwaukee, who called himself Theodor Graefe, deposited with said bank bank notes for twenty thousand marks (20,000 M.), German money, and for which said First National Bank delivered to said person savings bank book No. 30913, and entered upon such savings bank book, to the credit of said Theodor Graefe, the equivalent of twenty thousand marks (20,000 M.—, to-wit: Forty seven hundred and twenty
36 dollars ($4720); that thereafter, on or about the 14th day of August, 1901, the same person called again at said bank and

made another deposit of seventeen hundred dollars ($1700), which was credited in said savings bank book No. 30913.

That said sums have been on deposit in said bank ever since said 14th day of August, 1901, and are still on deposit therein; that the sum of Two hundred sixteen dollars and thirty two cents ($216.32) has accumulated as interest on said amounts, so that at the time of the service of the garnishee process herein, said bank had on deposit in the savings department sixty six hundred thirty six dollars and thirty two cents ($6636.32) standing in the name of Theodor Graefe; that this deponent and said bank have been informed that the said Theodor Graefe, in whose name said deposit stands, is the same person as defendant, Gerhard Terlinden, but that this deponent has not knowledge sufficient to form a belief and therefore submits all the facts to the Court.

That on the 17th day of August, 1901, the said garnishee was served with an affidavit and summons in garnishment in the following three actions in the Circuit Court of Milwaukee County, to-wit: Amsterdamische Bank *vs.* Gerhard Terlinden alias Theodor Graefe; First National Bank of Milwaukee, garnishee; Disconto Gesellschaft *vs.* Gerhard Terlinden alias Theodor Graefe, First National Bank of Milwaukee, garnishee; and Robert Suermont *vs.* Gerhard Terlinden alias Theodor Graefe, First National Bank of Milwaukee, garnishee; that in each of said actions the sum of Twenty five Thousand Dollars ($2500.00) is alleged to be due to the plaintiff therein from said defendant, by the affidavit in garnishment.

That said three actions are still pending in the Circuit Court of Milwaukee County and that this garnishee has not in any manner been released as garnishee in any or either of said actions.

FRANK J. KIPP.

Subscribed and sworn to before me this 28th day of May, 1903.

[SEAL.] H. G. GOLL,
Notary Public, Milwaukee Co., Wis.

My commission expires Jan. 30, 1905.

37 EXHIBIT "B."

Circuit Court, Milwaukee County.

AUGUSTUS C. UMBREIT, Plaintiff,
vs.
GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, WISCONSIN, and MARINE NATIONAL BANK OF MILWAUKEE, WISCONSIN, Garnishees.

STATE OF WISCONSIN, *Milwaukee County, ss:*

A. H. Lindsay being duly sworn, deposes and says that — is cashier of The Marine National Bank of Milwaukee, one of the garnishees named in the above entitled action; that on the 27th day

of May, 1903, said bank was served with a garnishee summons in the above entitled action; that on said date, said The Marine National Bank was not indebted to the above mentioned defendant, Gerhard Terlinden, but said bank was indebted to one Theodor Graefe, who had on deposit to his credit in said The Marine National Bank of Milwaukee, the sum of Five Thousand Dollars ($5000.00) in money; that said indebtedness is evidenced by a certificate of deposit made and issued by said bank on the 14th day of August, 1901, which certificate is numbered 3903, and is payable to the said Theodor Graefe upon demand upon the return of said certificate, with interest as on said certificate stated; that the liability of said bank to said Theodor Graefe is absolute.

This deponent further says that he has no knowledge sufficient to form a belief that the said Gerhard Terlinden and the said Theodor Graefe is one and the same person.

This deponent further says that on the 19th day of August, 1901, said The Marine National Bank of Milwaukee was served with a garnishee process in an action entitled "The Disconto Gesellschaft *vs.* Gerhard Terlinden alias Theodor Graefe, defendant, First National Bank of Milwaukee, Marine National Bank of Milwaukee, Merchants' Loan and Safe Deposit Company Garnishees; that said bank had not been discharged as such garnishee.

This deponent further says that said Bank holds no real estate, or any interest in land of any description, or any personal property or any instruments or papers relating to any such belonging to
38 the said Gerhard Terlinden or Theodor Graefe, or in which they are in any wise interested.

A. H. LINDSAY.

Subscribed and sworn to before me this 12th day of June, A. D. 1903.

[SEAL.] E. H. WILLIAMS,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Aug. 12, 1906.

EXHIBIT "C."

Paragraph 14 of the German bankruptcy law reads as follows: "Waehrend der Dauer des Konkursverfahrens finden Arreste und Zwangsvollstreckungen zu Gunsten einzelner Konkursglaeubiger weder in das zur Konkursmasse gehoerige, noch in das sonstige Vermoegen des Gemeinschuldners statt."

Translation of paragraph 14, German bankruptcy law:

"While bankruptcy proceedings are pending, individual bankrupt creditors can not seize and have compulsory process against either the property belonging to the bankrupt estate or other property belonging to the bankrupt debtor."

Filed Sept. 24, 1903.

A. A. WIEBER, *Clerk.*

[Endorsed:] Order to show cause and Affidavit of A. C. Umbreit.

39 STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,

vs.

GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees.

THE AMSTERDAMISCHE BANK, Plaintiff,

vs.

GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees.

ROBERT SUERMONT, Plaintiff,

vs.

GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees.

STATE OF WISCONSIN, *Milwaukee County, ss:*

Charles E. Wild, being first duly sworn, deposes and says: that he is one of the firm of Winkler, Flanders, Smith, Bottum & Vilas, who are the attorneys for the plaintiffs in each of the above entitled actions. That deponent has examined the records, files and proceedings in the action described in the affidavit of Augustus C.
40 Umbreit, sworn to September 22, 1903, wherein said Augustus C. Umbreit is plaintiff and the above named defendant Gerhard Terlinden is defendant. That said Gerhard Terlinden, the defendant in said action, in no wise appeared therein and, as deponent is informed and verily believes, had no knowledge or information in any way of said suit and was not served with any summons or other papers therein and that the judgment rendered therein was rendered upon default in said action, service if any of the summons in said action being had by publication only. That the Court rendering said judgment obtained no jurisdiction of said defendant, in said action, as deponent is advised and verily believes.

Deponent further alleges, on information and belief, that no bankrupt proceedings auxiliary to the proceedings in bankruptcy in Germany against Gerhard Terlinden set forth in said affidavit of said Umbreit, have been instituted in the State of Wisconsin or in the United States of America, either before or after the commencement

of either of the above entitled actions and that neither of the plaintiffs in the above entitled actions have, at any time, been restrained or enjoined by any Court having jurisdiction in the premises from commencing or prosecuting the above entitled actions or either of them.

CHAS. E. WILD.

Subscribed and sworn to before me this 3rd day of October, 1903.

FRED A. FOSTER,
Notary Public, Milwaukee County, Wisconsin.

Filed Oct. 3, 1903.

A. A. WIEBER, *Clerk.*

41 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,
vs.
GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees.

THE AMSTERDAMISCHE —, Plaintiff,
vs.
GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees.

ROBERT SUERMONT, Plaintiff,
vs.
GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees.

The order to show cause why an order should not be made bringing in Augustus C. Umbreit as a party defendant in and to the above entitled actions, and to each of them, coming on to be heard on the 3rd day of October 1903, said order to show cause having been based upon the affidavit of Augustus C. Umbreit, the record, papers on file and proceedings had in the above entitled actions; Joseph B. Doe, Esq., appearing for said Augustus C. Umbreit and Winkler, Flanders, Smith, Bottum & Vilas appearing for the above named plaintiffs, and on reading the affidavit of said Augustus C. Umbreit in support of said order to show cause and the affidavit of Charles E. Wild in opposition thereto, and after hearing the arguments of counsel and being advised in the premises;

On motion of Joseph B. Doe, attorney for said Augustus
42 C. Umbreit, it is ordered:

1. That the said Augustus C. Umbreit may intervene a party defendant in the above entitled garnishee actions and in each of them.

2. That the said Augustus C. Umbreit, within ten (10) days after the service of a copy of this order, or notice of its entry, upon the attorneys for the above named plaintiffs, serve upon the attorneys for the above named plaintiffs a copy of his answer in each of the above entitled garnishee actions.

3. That the above named plaintiffs, and each of them, may, within twenty (20) days after the service of said answer of said Augustus C. Umbreit, take issue upon said answer or take such other proceedings as they, and each of them, may be advised.

Dated this 27th day of October, 1903.

By the Court,

ORREN T. WILLIAMS, *Judge.*

Filed Oct. 29, 1903.

A. A. WIEBER, *Clerk.*

[Endorsed:] Order making Augustus C. Umbreit a party def't.

43 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,

vs.

GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees.

THE AMSTERDAMISCHE BANK, Plaintiff,

vs.

GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees.

ROBERT SUERMONT, Plaintiff,

vs.

GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees.

And now comes each of the above named plaintiffs in each of the above entitled actions, and each for himself and separately, excepts to the order made in each of said actions bearing date October 27,

1903, impleading as a party defendant to each of said above
44 entitled garnishee actions Augustus C. Umbreit, and except to each and every part of said order.

WINKLER, FLANDERS, SMITH,
BOTTUM & VILAS,
Attorneys for Each of said Plaintiffs in Each of the Above Entitled Actions.

45 [Endorsed:] Circuit Court, Milwaukee County. The Disconto Gesellschaft, Pl'ff, *vs.* Gerhard Terlinden, alias, &c., Def't, The First National Bank of Milwaukee, *et al.*, Garnishees. The Amsterdamische Bank, Pl'ff, *vs.* Gerhard Terlinden, alias, &c., Def't, The First National Bank of Milwaukee, *et al.*, Garnishees. Robert Suermont, Pl'ff, *vs.* Gerhard Terlinden, alias, &c., Def't, The First National Bank of Milwaukee, *et al.*, Garnishees. Exceptions of Plaintiffs to Order Making Gustav C. Umbreit Party Defendant. (Copy.) Filed Oct. 30, 1903. A. A. Wieber, Clerk. Winkler, Flanders, Smith, Bottum & Vilas, Attorneys at Law, Milwaukee, Wis., Telephone Main 78.

46 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,
vs.
GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees, AUGUSTUS C. UMBREIT, Intervening Defendant.

The answer of the above named intervening defendant to the plaintiff's affidavit of garnishment herein, by Joseph B. Doe, his attorney, shows to the court and alleges:

1. That he, the said intervening defendant, is and has been, ever since the year 1883, a citizen of the state of Wisconsin and of full age, and that ever since said date, he has resided and still does reside in the city of Milwaukee, Milwaukee County, Wisconsin.

2. That on or about the 26th day of May, 1903, an action was duly commenced in said court, in which said action said intervening defendant, Augustus C. Umbreit, was plaintiff, and the above named defendant, Gerhard Terlinden alias Theodor Graefe was defendant.

3. That in said action and on the 11th day of September, 1903, judgment was duly rendered and entered in favor of this intervening defendant and against said Gerhard Terlinden alias Theodor Graefe, for the sum of seven thousand five hundred and twenty five ($7525.00) dollars, damages and costs, and that no part of said judgment has been paid.

4. That at the time of the commencement of said action by the issuing of the summons therein, a garnishee affidavit and summons was duly made, executed, issued and served upon the above named garnishees, The First National Bank of Milwaukee and The Marine

National Bank of Milwaukee, in which garnishee action so commenced this intervening defendant was plaintiff and said Gerhard Terlinden alias Theodor Graefe defendant and said The
47 First National Bank of Milwaukee and The Marine National Bank of Milwaukee were garnishees.

5. That in said garnishee action, each of said garnishees have made answer, pursuant to the statute; that a copy of the answer of the garnishee, The First National Bank of Milwaukee, is hereto annexed, marked Exhibit "A" and made a part of this answer; that a copy of said answer of said garnishee, The Marine National Bank of Milwaukee, is hereto annexed, marked Exhibit "B" and made a part of this answer.

6. That the plaintiff in the above entitled action was at the time of the commencement thereof, and still is, an alien, a non-resident of the state of Wisconsin and a resident of a foreign country, to-wit: a resident of the city of Berlin, in the Empire of Germany, and was organized and then existed and still exists solely under and by virtue of the laws of said Empire of Germany.

7. That on the 27th day of July, 1901, at Oberhausen, Rhine Province, German Empire, certain proceedings were had in the courts of said country, wherein and whereby said defendant, Gerhard Terlinden alias Theodor Graefe, was duly declared a bankrupt, in which proceeding one Paul Hecking was duly appoined trustee in bankruptcy for the estate and property of said Gerhard Terlinden alias Theodor Graefe, and as this intervening defendant is informed and believes, said Hecking is still such trustee.

8. That in such bankruptcy proceedings and before the commencement of the above entitled action and the issuing of the garnishee process therein and the commencement of any action against said Gerhard Terlinden alias Theodor Graefe in any of the courts of this state, the above named plaintiff, The Disconto Gesellschaft, duly filed its claim against said Gerhard Terlinden alias Theodor Graefe with said trustee in bankruptcy and submitted to the jurisdiction of said courts of the German Empire and participated in the proceedings in said matter had therein and still is a party to said bankruptcy proceedings.

9. That said claim so filed by said plaintiff in said bankruptcy proceedings was and is the identical claim upon which the above entitled action is based and the identical claim set forth and referred to in the affidavit in garnishment in this action.

48 10. That among the provisions of the bankruptcy law or code of the German Empire is a provision known as paragraph fourteen (14) of the German Bankruptcy Code, which provides as follows:

"Waehrend der Dauer des Konkursverfahrens finden Arreste und Zwangsvollstreckungen zu Gunsten einzelner Konkursglaeubiger weder in das zur Konkursmasse gehoerige, noch in das sonstige Vermoegen des Gemeinschuldners statt";

That a correct translation of said paragraph fourteen (14) is as follows:

"While bankruptcy proceedings are pending, individual bankrupt

creditors can not seize and have compulsory process against either the property belonging to the bankrupt estate or other property belonging to the bankrupt debtor."

11. That the above named intervening defendant has not filed his claim or judgment against said Gerhard Terlinden alias Theodor Graefe with said trustee in bankruptcy and has in no wise submitted to the jurisdiction of the courts of said German Empire in said proceeding, or otherwise, and has in no manner participated in said bankruptcy proceedings.

Wherefore, said intervening defendant prays the judgment of this court, declaring and adjudging the lien created by the service of the garnishee process in the action wherein said intervening defendant was plaintiff and the said Gerhard Terlinden alias Theodor Graefe defendant, and The First National Bank of Milwaukee, Wisconsin, and The Marine National Bank of Milwaukee, Wisconsin, garnishees, a prior and superior lien to the lien created by the issuance of the garnishee process in the above entitled action, in favor of said plaintiff and against said The First National Bank of Milwaukee, Wisconsin, and The Marine National Bank of Milwaukee, Wisconsin, garnishees, and directing and adjudging that the judgment of said intervening defendant be first satisfied out of the property in the hands of said The First National Bank of Milwaukee, Wisconsin, and The Marine National Bank of Milwaukee, Wisconsin, together with the intervening defendant's costs and disbursements of this action.

JOSEPH B. DOE,
Attorney for Intervening Defendant.

49 STATE OF WISCONSIN, *Milwaukee County, ss:*

Augustus C. Umbreit being first duly sworn, on oath deposes and says that he is the intervening defendant in the above entitled action; that he has read the above and foregoing answer to the plaintiff's affidavit of garnishment and knows the contents thereof and that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters, he believes it to be true.

AUGUSTUS C. UMBREIT.

Subscribed and sworn to before me this 31st day of October, 1903.

MAMIE E. HUGHES,
Notary Public, Milwaukee County, Wisconsin.

50 EXHIBIT "A."

Circuit Court, Milwaukee County.

AUGUSTUS C. UMBREIT, Plaintiff,
vs.
GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, WIS., and THE MARINE NATIONAL BANK OF MILWAUKEE, WIS., Garnishees.

STATE OF WISCONSIN, *Milwaukee County, ss:*

Frank J. Kipp being first duly sworn deposes and says that he is the cashier of the above named garnishee, The First National Bank of Milwaukee, and makes this affidavit for and on behalf of said garnishee, being duly authorized so to do.

That on the 27th day of May, 1903, the above named garnishee was served with a garnishee summons in the above entitled action; that said garnishee was not, at the time of the service of the garnishee summons and has not since become, indebted or under any liability to the defendant named in the garnishee summons in any manner or upon any account, except as hereinafter set forth.

That said garnishee did not hold, at the time of the service of the garnishee summons and since that date has not held and now does not hold, the title or possession of any real estate or any interest in land of any description or any personal property, effects or credits or any instruments or papers relating to any such belonging to the defendant or in which he has any interest, except as hereinafter stated.

That on or about the 9th day of August, 1901, a person unknown to this deponent and to said First National Bank of Milwaukee, who called himself Theodor Graefe, deposited with said bank bank notes for twenty thousand marks (20,000 M.), German money, and for which said First National Bank delivered to said person savings bank book No. 30913, and entered upon such savings bank book, to the credit of said Theodor Graefe, the equivalent of twenty thousand marks (20,000 M.), to-wit: forty-seven hundred and twenty
51 dollars ($4720); that thereafter, on or about the 14th day of August, 1901, the same person called again at said bank and made another deposit of seventeen hundred dollars ($1700), which was credited in said savings bank book No. 30913.

That said sums have been on deposit in said bank ever since said 14th day of August, 1901, and are still on deposit therein; that the sum of two hundred sixteen dollars and thirty two cents ($216.32) has accumulated as interest on said amounts, so that at the time of the service of the garnishee process herein, said bank had on deposit in the savings department sixty six hundred thirty six dollars and thirty two cents (6636.32) standing in the name of Theodor Graefe; that this deponent and said bank have been informed that the said Theodor Graefe, in whose name said deposit stands, is the same person

as defendant, Gerhard Terlinden, but that this deponent has not knowledge sufficient to form a belief and therefore submits all the facts to the court.

That on the 17th day of August, 1901, the said garnishee was served with an affidavit and summons in garnishment in the following three actions in the Circuit Court of Milwaukee County, to-wit: Amsterdamische Bank *vs.* Gerhard Terlinden alias Theodor Graefe; First National Bank of Milwaukee, garnishee; Disconto Gesellschaft *vs.* Gerhard Terlinden alias Theodor Graefe, First National Bank of Milwaukee, garnishee; and Robert Suermont *vs.* Gerhard Terlinden alias Theodor Graefe, First National Bank of Milwaukee, garnishee; that in each of said actions the sum of twenty-five thousand dollars ($25,000) is alleged to be due to the plaintiff therein from said defendant, by the affidavit in garnishment.

That said three actions are still pending in the Circuit Court of Milwaukee County and that this garnishee has not in any manner been released as garnishee in any or either of said actions.

FRANK J. KIPP.

Subscribed and sworn to before me this 28th day of May, 1903.

[SEAL.] H. G. GOLL,
Notary Public, Milwaukee Co., Wis.

My commission expires Jan. 30, 1905.

52 EXHIBIT "B."

Circuit Court, Milwaukee County.

AUGUSTUS C. UMBREIT, Plaintiff,
vs.
GERHARD TERLINDEN, Defendant, FIRST NATIONAL BANK OF MILWAUKEE, WISCONSIN, and MARINE NATIONAL BANK OF MILWAUKEE, WISCONSIN, Garnishees.

STATE OF WISCONSIN, *Milwaukee County, ss:*

A. H. Lindsay being duly sworn, deposes and says that he is cashier of The Marine National Bank of Milwaukee, one of the garnishees named in the above entitled action; that on the 27th day of May, 1903, said bank was served with a garnishee summons in the above entitled action; that on said date, said The Marine National Bank was not indebted to the above mentioned defendant, Gerhard Terlinden, but said bank was indebted to one Theodor Graefe, who had on deposit and to his credit in said The Marine National Bank of Milwaukee, the sum of five thousand dollars ($5000.00) in money; that said indebtedness is evidenced by a certificate of deposit made and issued by said bank on the 14th day of August, 1901, which certificate is numbered 3903, and is payable to the said Theodore Graefe upon demand upon the return of said certificate, with interest

as on said certificate stated; that the liability of said bank to said Theodor Graefe is absolute.

This dependent further says that he has no knowledge sufficient to form a belief that the said Gerhard Terlinden and the said Theodor Graefe is one and the same person.

This deponent further says that on the 19th day of August, 1901, said The Marine National Bank of Milwaukee was served with a garnishee process in an action entitled "The Disconto Gesellschaft *vs.* Gerhard Terlinden alias Theodor Graefe, defendant, First National Bank of Milwaukee, Marine National Bank of Milwaukee, Merchants' Loan and Safe Deposit Company, garnishees;" that said bank has not been discharged as such garnishee.

This deponent further says that said bank holds no real estate, or any interest in land of any description, or any personal property or any instruments or papers relating to any such belonging to the said Gerhard Terlinden or Theodor Graefe, or in which they are in any wise interested.

A. H. LINDSAY.

Subscribed and sworn to before me this 12th day of June, A. D. 1903.

[SEAL.] E. H. WILLIAMS,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Aug. 12, 1906.

53 [Endorsed:] Copy. Circuit Court, Milwaukee County. The Disconto Gesellschaft, Pl'ff, *vs.* Gerhard Terlinden, etc., Def't. The First Nat. Bank of Milw. *et al.*, Garnishees, Augustus C. Umbreit, Intervening defendant. Answer of intervening defendant. Received Nov. 5, 1903. Winkler, Flanders, Smith, Bottum & Vilas. Hoyt, Doe, Umbreit & Olwell, Attorneys and Counselors at Law, The Herman Building, Milwaukee. Filed Nov. 19, 1903. A. A. Weber, Clerk.

54 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,
vs.
GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN & SAFE DEPOSIT COMPANY, Garnishees; AUGUSTUS C. UMBREIT, Intervening Defendant.

And now comes the above named plaintiff, by Winkler, Flanders, Smith, Bottum & Vilas, his attorneys and for reply to the answer of the above named intervening defendant to the plaintiff's affidavit of garnishment herein alleges as follows:

First. He admits the first, sixth and seventh paragraphs of the intervening defendant's answer.

Second. That the above named plaintiff has no knowledge or information sufficient to form a belief as to whether or not said intervening defendant has filed his claim or judgment in the bankruptcy proceedings in the courts of the German empire, or has submitted to the jurisdiction of said courts, as alleged in the eleventh paragraph of said answer, and therefore denies the same.

Third. The above named plaintiff denies each and every other matter, fact and thing set forth in said answer, except as hereinafter specifically admitted, qualified or explained.

Fourth. This plaintiff, for further reply to said answer, alleges that on or about the 26th day of May, 1903, an action was commenced in the above named court wherein said intervening defendant was plaintiff and the above named Gerhard Terlinden was defendant, and that in said action on the 11th day of September, 1903, a judgment was entered in favor of said intervening defendant and against said Gerhard Terlinden for the sum of seven thousand five hundred twenty-five dollars ($7,525), and that at the time of the commencement of said action last aforesaid the above named garnishees, The First National Bank of Milwaukee and the Marine National Bank of Milwaukee, were served with an affidavit and summons in garnishment, in which summons the above named intervening defendant was plaintiff, the above named Gerhard Terlinden was defendant, and said two banks last named were named as garnishees, and that each of said banks made answer to said garnishee process by serving on said intervening defendant answers of the tenor and effect of Exhibits A and B annexed to the answer of said intervening defendant; that in said action so commenced, wherein said intervening defendant is plaintiff and said Gerhard Terlinden is defendant, no process was served upon such defendant, and he in no wise appeared therein, and had no knowledge or information, in any way, of said suit, and that the judgment rendered in said action was rendered as upon default; that no jurisdiction was obtained of said defendant in said action, and that said judgment is of no force or validity whatsoever.

The above named plaintiff further alleges that on the 17th day of August, 1901, when the above entitled garnishee action was instituted by said plaintiff against said Gerhard Terlinden, and said First National Bank of Milwaukee and said Marine National Bank of Milwaukee as garnishees, and the affidavit and summons in garnishment therein were served upon said above named garnishees, the said intervening defendant herein was not a creditor of the above named defendant Gerhard Terlinden and had no cause of action against him, and that the cause of action, if any, on which said intervening defendant brought suit on or about the 26th day of May, 1903, against said Gerhard Terlinden, and in which action judgment was rendered on September 11, 1903, did not accrue and was not a subsistent cause of action until the 1st day of February, 1903.

Fifth. The above named plaintiff further alleges that the above named defendant Gerhard Terlinden, having fraudulently procured from this plaintiff the sum of about One hundred thousand dollars

($100,000), did, shortly after so fraudulently procuring said money, to-wit: in the month of July, 1901, abscond from the empire of Germany (of which empire he was then a resident and inhabitant), and concealed himself, under a false name, in the state of Wisconsin, where he was, on or about the 16th day of August, 1901, arrested, and thereafter extradited under extradition proceedings duly instituted in the United States District Court for the Northern District of Illinois as a fugitive from justice of said German empire; that said defendant brought with him to said state of Wisconsin moneys from said German empire to a large amount, of which the above named plaintiff was able to discover not to exceed an amount of twenty-five thousand dollars ($25,000); and thereupon, on the 17th day of August, 1901, for the recovery of the damages so by it sustained by the fraudulent acts of said defendant, this plaintiff commenced an action in this court against said defendant, and by process of attachment and garnishment seized and levied upon all the moneys and properties of said defendant so brought into the state of Wisconsin, being an amount not exceeding $25,000; and that thereafter this plaintiff filed its claim for said damages so sustained with the trustee in bankruptcy appointed in the bankruptcy proceedings instituted in the German empire, mentioned in the answer of said intervening defendant, but that he has received no satisfaction thereof in any manner.

This plaintiff further alleges that the bankrupt code of the German empire contains paragraph 14, set out in the answer of the intervening defendant, but it denies that said answer of said intervening defendant contains a correct translation thereof into
57 English; that the correct translation of said paragraph is as follows:

"While bankruptcy proceedings are pending, no seizure and compulsory process in favor of individual creditors of the bankrupt shall be taken against either the property taken charge of by the bankrupt court or against other property belonging to the bankrupt debtor."

This plaintiff further alleges that said 14th paragraph of said German bankrupt code does not apply to individual creditors of the bankrupt seizing property belonging to the bankrupt debtor outside of the jurisdiction of said German bankruptcy court, and that said 14th paragraph has no force and validity outside the jurisdiction of said German bankruptcy court.

Wherefore the plaintiff demands that the answer of said intervening defendant be dismissed with costs.

WINKLER, FLANDERS, SMITH,
BOTTUM & VILAS,
Attorneys for The Disconto Gesellschaft, Plaintiff.

STATE OF WISCONSIN, *Milwaukee County, ss:*

Charles E. Wild, being first duly sworn, deposes and says that he is one of the attorneys for the above named plaintiff, and makes this verification for and in its behalf; that he has read the foregoing reply and knows the contents thereof, and believes the same to be

true; that the grounds of his belief are an inspection of documents and correspondence and depositions relative to the matters set out in said reply; that the reason this verification is not made by said plaintiff is that it is a foreign corporation, and that none of its officers are now within the county of Milwaukee, where deponent resides.

CHAS. E. WILD.

Subscribed and sworn to before me this 23d day of December, A. D. 1903.

JOHN H. HURLEY,
Notary Public, Milwaukee County, Wisconsin.

58 [Endorsed:] Circuit Court, Milwaukee County. The Disconto Gesellschaft, Plaintiff, *vs.* Gerhard Terlinden etc., Defendant, The First Nat. Bank of Milw. *et al.*, Garnishees, Augustus C. Umbreit, Intervening Defendant. Reply to Answer of Intervening Def't. (Copy) Served Dec. 23, 1903. Winkler, Flanders, Smith, Bottum & Vilas, Attorneys at Law, Milwaukee, Wis. Telephone Main 78. Filed Jan. 6, 1904 A. A. Wieber Clerk.

59 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,
vs.
GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, MARINE NATIONAL BANK OF MILWAUKEE, MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees; AUGUSTUS C. UMBREIT, Intervening Defendant.

Upon reading and filing the annexed affidavit of Augustus C. Umbreit and on motion of Joseph B. Doe, attorney *attorney* for said intervening defendant,

It is ordered that said intervening defendant have leave to serve and file the annexed amended intervening answer in the above entitled action — may, within twenty days after the service of the amended intervening answer herein, reply to said answer or serve and file such other pleading as it may be advised.

Dated this 16th day of June, 1904.

By the Court,

ORREN T. WILLIAMS, *Judge.*

Filed June 16, 1904.

A. A. WIEBER, *Clerk.*

60 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,
vs.
GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, MARINE NATIONAL BANK OF MILWAUKEE, MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees; AUGUSTUS C. UMBREIT, Intervening Defendant.

STATE OF WISCONSIN, *Milwaukee County, ss:*

Augustus C. Umbreit being first duly sworn, on oath deposes and says that he is the intervening defendant in the above entitled action; that on or about the 26th day of May, 1903, an action was duly commenced in this Court, in which said action this affiant was plaintiff and the above named defendant, Gerhard Terlinden alias Theodor Graefe, was defendant, that in said action and on the 11th day of September, 1903, judgment was recovered and entered in favor of this affiant and against said defendant, Gerhard Terlinden alias Theodor Graefe, for the sum of Seventy five hundred and Twenty five ($7525.00) Dollars, damages and costs; that said judgment was entered as by default, said defendant in no wise appearing and the summons having been served by publication.

That after the serving and filing the answer of this affiant in the above entitled action, this affiant learned and discovered that said judgment was void, for the reason that the affidavit for the publication of the summons herein was fatally defective, in that said affidavit was too indefinite and uncertain; that thereupon, this affiant abandoned said judgment and another action was commenced on or about the 21st day of March, 1904, in which said action this affiant was plaintiff and said defendant, Gerhard Terlinden alias Theodor Graefe was defendant; that in said action so commenced on said day and on the 10th day of June, 1904, judgment was duly rendered and entered in favor of this affiant and against said defendant, Gerhard Terlinden alias Theodor Graefe, for the sum of Seventy-five Hundred ($7500.00) dollars damages, which judgment is now of record herein.

61 That this affiant makes this affidavit for the purpose of asking leave of the Court to amend this intervening answer in the above entitled action to the extent of setting out in this amended answer the commencement of said second action herein described and the entering of judgment in said second action on the 11th day of June, 1904, said amended answer being hereto attached and made a part of this affidavit.

AUGUSTUS C. UMBREIT.

Subscribed and sworn to before me this 16th day of June, 1904.
MAMIE E. HUGHES,
Notary Public, Milwaukee County, Wisconsin.

Filed June 16th, 1904.
A. A. WIEBER, *Clerk.*

62 Filed Nov. 19, 1903. A. A. Wieber, Clerk.

Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff and Respondent,
vs.
GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, Garnishee; AUGUSTUS C. UMBREIT, Intervenor and Appellant.

63 *Amended Answer of Intervenor.*

[Title.]

The answer of the above named intervening defendant to the plaintiff's affidavit of garnishment herein, by Joseph B. Doe, his attorney, shows to the court and alleges:

1. That he, the said intervening defendant, is and has been, ever since the year 1883, a citizen of the state of Wisconsin, and
64 of full age, and that ever since said date, he has resided and still does reside in the city of Milwaukee, Milwaukee County, Wisconsin.

2. That on or about the 21st day of March, 1904, an action was duly commenced in said court, in which said action said intervening defendant, August C. Umbreit, was plaintiff, and the above named defendant, Gerhard Terlinden, alias Theodor Graefe, was defendant.

3. That in said action and on the 10th day of June, 1904, judgment was duly rendered and entered in favor of this intervening defendant and against said Gerhard Terlinden alias Theodor Graefe, for the sum of seven thousand five hundred ($7500.00) dollars damages, and that no part of said judgment has been paid.

4. That at the time of the commencement of said action by the issuing of the summons therein, a garnishee affidavit and summons was duly made, executed, issued and served upon the above named garnishees, The First National Bank of Milwaukee and The Marine National Bank of Milwaukee, in which garnishee action so commenced this intervening defendant was plaintiff and said Gerhard Terlinden alias Theodor Graefe defendant, and said The First National Bank of Milwaukee and The Marine National Bank of Milwaukee were garnishees.

5. That in said garnishee action, each of said garnishees have made answer, pursuant to the statute; that a copy of the answer of the garnishee, The First National Bank of Milwaukee, is hereto annexed, marked Exhibit "A" and made a part of this answer; that a copy of said answer of said garnishee, The Marine National
65 Bank of Milwaukee is hereto annexed, marked Exhibit "B," and made a part of this answer.

6. That the plaintiff in the above entitled action was at the time of the commencement thereof, and still is, an alien, a non-resident of the state of Wisconsin and a resident of a foreign country, to-wit: a

resident of the city of Berlin, in the empire of Germany, and was organized and then existed and still exists solely under and by virtue of the laws of said Empire of Germany.

7. That on the 27th day of July, 1901, at Oberhausen, Rhine Province, German Empire, certain proceedings were had in the courts of said country, wherein and whereby said defendant, Gerhard Terlinden alias Theodor Graefe, was duly declared a bankrupt, in which proceeding one Paul Hecking was duly appointed trustee in bankruptcy for the estate and property of said Gerhard Terlinden alias Theodor Graefe, and as this intervening defendant is informed and believes, said Hecking is still such trustee.

8. That in such bankruptcy proceedings and before the commencement of the above entitled action and the issuing of the garnishee process therein and the commencement of any action against said Gerhard Terlinden alias Theodor Graefe in any of the courts of this state, the above named plaintiff, The Disconto Gesellschaft, duly filed its claim against said Gerhard Terlinden alias Theodor Graefe with said trustee in bankruptcy and submitted to the jurisdiction of said courts of the German Empire, and participated in the proceedings in said matter had therein and still is a party to said bankruptcy proceedings.

9. That said claim so filed by said plaintiff in said bank-
66 ruptcy proceedings was and is the identical claim upon which the above entitled action is based and the identical claim set forth and referred to in the affidavit in garnishment in this action.

10. That among the provisions of the bankruptcy law or code of the German Empire is a provision known as paragraph fourteen (14) of the German Bankruptcy Code, which provides as follows:

"Waehrend der Dauer des Konkursverfahrens finden Arreste und Zwangsvollstreckungen zu Gunsten einzelner Konkursglaubiger weder in das zur Konkursmasse gehoerige, noch in das sonstige Vermoegen des Gemeinschuldners statt."

That a correct translation of said paragraph fourteen (14) is as follows:

"While bankruptcy proceedings are pending, individual bankrupt creditors cannot seize and have compulsory process against either the property belonging to the bankrupt estate or other property belonging to the bankrupt debtor."

11. That the above named intervening defendant has not filed his claim or judgment against said Gerhard Terlinden alias Theodor Graefe with said trustee in bankruptcy and has in no wise submitted to the jurisdiction of the courts of said German Empire in said proceedings, or otherwise, and has in no manner participated in said bankruptcy proceedings.

Wherefore, said intervening defendant prays the judgment of this court, declaring and adjudging the lien created by the service of the garnishee process in the action wherein said interven-
67 ing defendant was plaintiff and the said Gerhard Terlinden alias Theodor Graefe, defendant, and The First National Bank of Milwaukee, Wisconsin, and The Marine National Bank of Milwaukee, Wisconsin, garnishees, a prior and superior lien to the

lien created by the issuance of the garnishee process in the above entitled action, in favor of said plaintiff and against said The First National Bank of Milwaukee, Wisconsin, and The Marine National Bank of Milwaukee, Wisconsin, garnishees, and directing and adjudging that the judgment of said intervening defendant be first satisfied out of the property in the hands of said The First National Bank of Milwaukee, Wisconsin, and The Marine National Bank of Milwaukee, Wisconsin, together with the intervening defendant's costs and disbursements of this action.

JOSEPH B. DOE,
Attorney for Augustus C. Umbreit,
Intervening Defendant.

[Verification.]

STATE OF WISCONSIN, *Milwaukee County, ss:*

Augustus C. Umbreit being first duly sworn, on oath deposes and says that he is the intervening defendant in the above entitled action; that he has read the above and foregoing answer to the plaintiff's affidavit of garnishment and knows the contents thereof and that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters, he believes it to be true.

AUGUSTUS C. UMBREIT.

Subscribed and sworn to before me this 31st day of October, 1903.
MAMIE E. HUGHES,
Notary Public, Milwaukee County, Wisconsin.

EXHIBIT "A."

[Title.]

STATE OF WISCONSIN, *Milwaukee County, ss:*

Frank J. Kipp, being first duly sworn, deposes and says that he is cashier of the above named garnishee, The First National Bank of Milwaukee, and makes this affidavit for and on behalf of said garnishee, because it is a corporation, and that he is duly authorized so to do; that on the 22nd day of March, 1904, the above named garnishee was served with a summons in the above entitled
68 action; that said garnishee was not at the time of the service of the garnishee summons and has not since become indebted or under any liability to the defendant named in the garnishee summons in any manner or upon any account except as hereinafter stated.

That said garnishee did not hold at the time of the service of the garnishee summons, and since that date has not held and now does not hold the title or possession of any real estate, or any interest in land of any description, or of any personal property, effects or credits,

or any instruments or papers relating to any such, belonging to the defendant or in which he has in any wise interest except as hereinafter stated.

That on or about the 8th day of August, A. D. 1901, a person unknown to this deponent and to said First National Bank of Milwaukee, who called himself Theodore Graefe, deposited with said bank bank notes for twenty thousand (20,000) marks, German money, and for which said First National Bank delivered to said person Savings Bank Book No. 30,913, and entered upon such savings book, to the credit of said Theodor Graefe, the equivalent of twenty thousand (20,000) marks, to-wit: four thousand seven hundred twenty dollars ($4720.00); that thereafter, on or about the 14th day of August, 1901, the same person called again at said bank and made another deposit of seventeen hundred ($1700.00) dollars, which was credited in said Savings Bank Book No. 50,913, so that at the date of service of said garnishee process this bank had on deposit in the Savings Department six thousand four hundred twenty
69 ($6,420.00) dollars, standing in the name of Theodor Graefe, but whether the same is the property of Theodor Graefe or whether Theodor Graefe is the same person as Gerhard Terlinden, this deponent has no knowledge sufficient to form a belief and therefore submits all the facts to the court.

That heretofore, to-wit: on or about the 17th day of August, 1901, said garnishee was served with an affidavit and summons in garnishment in the following three actions in the Circuit Court for Milwaukee County, to-wit: (1) Robert Suermont against Gerhard Terlinden alias Theodor Graefe, The First National Bank, garnishee, in which affidavit for garnishment twenty-five thousand ($25,000.00) dollars is alleged to be due from the said defendant to the said plaintiff; (2) The Disconto Gesellschaft against Gerhard Terlinden alias Theodor Graefe, The First National Bank, garnishee, in which affidavit for garnishment twenty-five thousand ($25,000.00) dollars is alleged to be due from the said defendant to the said plaintiff; (3) The Amsterdamsche Bank against Gerhard Terlinden alias Theodor Graefe, The First National Bank, garnishee, in which affidavit for garnishment twenty-five thousand ($25,000.00) dollars is alleged to be due from the said defendant to the said plaintiff.

That upon the answers of said garnishee, the said three respective plaintiffs have taken issue and said three actions are still pending and undetermined in this court.

FRANK J. KIPP.

Subscribed and sworn to before me this 24th day of March, 1904.

H. G. GOLL,
Notary Public, Milwaukee Co., Wis.

My commission expires Jan. 30, 1905.

70 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,

vs.

GERHARD TERLINDEN, alias THEODOR GRAEFE, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, THE MARINE NATIONAL BANK OF MILWAUKEE, THE MILWAUKEE TRUST COMPANY OF MILWAUKEE, and THE MERCHANTS' LOAN AND SAFE DEPOSIT COMPANY, Garnishees; AUGUSTUS C. UMBREIT, Intervening Defendant.

And now comes the above named plaintiff and excepts to the order of the Court dated June 16th, 1904, granting leave to said intervening defendant to serve and file the amended intervening answer annexed thereto and to the whole and each and every part of said order.

WINKLER, FLANDER-, SMITH,
BOTTUM & VILAS,
Att'ys for the Disconto Gesellschaft, Pl't'ffs.

Filed June 27th, 1904.

A. A. WIEBER, *Clerk.*

71 *Reply of Plaintiff to Amended Answer of Intervenor.*

[Title.]

And now comes the above named plaintiff, by Winkler, Flanders, Smith, Bottum & Vilas, its attorneys, and for reply to the amended answer of the above named intervening defendant, Augustus C. Umbreit, to the plaintiff's affidavit of garnishment herein, alleges as follows:

First. It admits the first, sixth and seventh paragraphs of the intervening defendant's amended answer.

Second. That the above named plaintiff has no knowledge or information sufficient to form a belief as to whether or not said intervening defendant has filed his claim for judgment in the bankruptcy proceedings in the courts of the German Empire set forth in said amended answer, or as to whether said intervening defendant has submitted to the jurisdiction of said courts, as alleged in the eleventh paragraph of said amended answer, and therefore denies the same.

Third. The above named plaintiff denies each and every other matter, fact and thing set forth in said amended answer, except as herein specifically admitted, qualified or explained.

Fourth. This plaintiff further alleges that on or about 21st
72 day of March, 1904, an action was commenced in the above named court by said intervening defendant, as plaintiff, against the above named defendant, Gerhard Terlinden, as defendant, and that on the 10th day of June, 1904, a judgment was entered in said action in favor of said intervening defendant and against said Gerhard Terlinden for seven thousand five hundred ($7500.00) dollars; that at the time of the commencement of said action last afore-

said the above named garnishees, The First National Bank of Milwaukee and the Marine National Bank of Milwaukee, were served with an affidavit and summons of garnishment, in which summons the above named intervening defendant was plaintiff and the above named Gerhard Terlinden was defendant, and said two banks last named were garnishees, and that each of said banks made answer to said garnishee process by serving on said intervening defendants answers of the tenor and effect of Exhibits "A" and "B" annexed to said amended answer of said intervening defendant; that in said action so commenced by said intervening defendant against said Gerhard Terlinden no process was served upon said Gerhard Terlinden, and he in no wise appeared therein and had no knowledge or information in any way of said suit, and that the judgment rendered therein was rendered as upon default; that no jurisdiction was obtained of said defendant in said action, and that said judgment is of no force or validity whatsoever.

The plaintiff further alleges that on the 17th day of August, 1901, when it instituted the above entitled garnishee action against
73 said Gerhard Terlinden and said The First National Bank of Milwaukee and said The Marine National bank of Milwaukee, as garnishees, and when the affidavit and summons in garnishment therein were served upon said above named garnishees, the said intervening defendant herein was not a creditor of the above named defendant, Gerhard Terlinden, and had no cause of action against him, and that the cause of action, if any, on which said intervening defendant brought suit against said Terlinden, on or about the 21st day of March, 1904, and in which suit judgment was rendered on June 10, 1904, did not accrue and was not a subsisting cause of action until on or about the 1st day of February, 1903.

Fifth. The above named plaintiff further alleges that the above named defendant, Gerhard Terlinden, having fraudulently procured from this plaintiff the sum of about one hundred thousand ($100,000.00) dollars, did, shortly after so fraudulently procuring said money, to-wit: in the month of July, 1901, abscond from the Empire of Germany (of which Empire he was then a resident and inhabitant), and conceal himself under a false name, in the state of Wisconsin, where he was, on or about the 16th day of August, 1901, arrested, and thereafter extradited under extradition proceedings duly instituted in the United States District Court for the Northern District of Illinois, as a fugitive from justice of said German Empire; that said defendant brought with him to said state of Wisconsin moneys from said German Empire, to a large amount, of which the above named plaintiff was able to discover not to exceed an
74 amount of twenty-five thousand ($25,000.00) dollars, and thereupon, on the 17th day of August, 1901, for the recovery of the damages so by it sustained by the fraudulent acts of said defendant, this plaintiff commenced an action in this court against said defendant, and by process of attachment and garnishment seized and levied upon all the money and properties of said defendant so brought into the state of Wisconsin, being an amount not exceeding $25,000.00; that said defendant, Gerhard Terlinden, appeared in

said action and answered the plaintiff's complaint therein, and that thereafter such proceedings were had in said action that judgment was duly given in favor of this plaintiff and against said Terlinden, on the 19th day of February, 1904, for the sum of $94,145.11 damages and costs; that said judgment was duly docketed in the office of the Clerk of the Circuit Court of Milwaukee County on the 26th day of February, 1904; that said plaintiff *was* collected, by special action issued upon said judgment, the sum of $9,402.39, which has been applied thereon, leaving due on said judgment $85,371.49, with interest from March 26, 1904, which said amount is wholly unpaid; that after the commencement of said action last above described, and prior to the rendition of judgment therein as above set forth, this plaintiff filed its claim for the damages by it sustained by the fraudulent acts of said defendant, hereinbefore alleged, with the trustee in bankruptcy, appointed in the bankruptcy proceedings instituted in the German Empire mentioned in the amended answer of said intervening defendant, but that it has received no satisfaction thereof in any manner.

75 This plaintiff further alleges that the bankrupt code of the German Empire contains paragraph 14, set out in the answer of the intervening defendant, but it denies that said answer of said intervening defendant contains a correct translation thereof into English; that the correct translation of said paragraph is as follows:

"While bankruptcy proceedings are pending, no seizure and compulsory process in favor of individual creditors of the bankrupt shall be taken against either the property taken charge of by the bankrupt court or against other property belonging to the bankrupt debtor."

This plaintiff further alleges that said 14th paragraph of said German bankrupt code does not apply to individual creditors of the bankrupt seizing property belonging to the bankrupt debtor outside of the jurisdiction of said German bankruptcy court, and that said 14th paragraph has no force and validity outside the jurisdiction of said German bankruptcy court.

Wherefore, the plaintiff demands that the amended answer of said intervening defendant be dismissed, with costs.

WINKLER, FLANDERS, SMITH,
BOTTUM & VILAS,
Attorneys for The Disconto Gesellschaft, Plaintiff.

76 STATE OF WISCONSIN, *Milwaukee County, ss:*

Charles E. Wild, being first duly sworn, deposes and says that he is one of the attorneys for the above named plaintiff, and makes this verification for and in his behalf; that he has read the foregoing reply and knows the contents thereof, and believes the same to be true; that the grounds of his belief are an inspection of documents and correspondence and depositions relative to the matter set out in said reply; that the reason this verification is not made by said plaintiff is that it is a foreign corporation and none of its officers are now within the County of Milwaukee, where deponent resides.

CHAS. E. WILD.

Subscribed and sworn to before me this 27th day of June, 1904.
JOHN H. HURLEY,
Notary Public, Milwaukee County, Wisconsin.

Filed June 28th, 1904.
A. A. WIEBER, *Clerk.*

[Endorsed:] Reply to Amended Ans. of intervening Def't. Filed Jun- 28, 1904 A. A. Wieber, Clerk.

77 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,
vs.
GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, Garnishee; AUGUSTUS C. UMBREIT, Interpleaded Defendant.

The issues raised by the affidavit of garnishment and the answer of the garnishee and defendant thereto and the amended answer of the intervening defendant and the reply thereto, having been duly reached for trial before this court, the Honorable L. W. Halsey, circuit judge presiding, and having been duly tried by said court on the second and third days of November, 1904, the plaintiff appearing by Winkler, Flanders, Smith, Bottum & Fawsett, its attorneys, the defendant Terlinden by A. C. Umbreit, his attorney, the garnishee First National Bank of Milwaukee by Miller, Noyes & Miller, its attorneys, and the interpleaded defendant Augustus C. Umbreit by J. B. Doe, his attorney, and the same having been duly submitted and counsel for the respective parties having been heard, and the court being now well and sufficiently advised in the premises, finds as

Findings of Fact.

I.

That on the 17th day of August, 1901 the above named plaintiff the Disconto Gesellschaft commenced an action in this court against the above named defendant Gerhard Terlinden for the recovery of damages sustained by the tort of the said defendant committed in the month of May, 1901; that said defendant appeared in said action by A. C. Umbreit, his attorney, on August 19, 1901, and an-
78 swered the plaintiff's complaint; that thereafter such proceedings were had in said action that judgment was duly given on February 19, 1904 in favor of said plaintiff Disconto Gesellschaft and against said defendant Terlinden for $94,145.11 damages and costs; that $85,371.49 with interest from March 26, 1904 is now due and unpaid thereon; that at the time of the commencement of said action to-wit: on August 17, 1901, process in garnishment was served on the above named garnishee First National Bank of Milwaukee as garnishee of the defendant Terlinden.

II.

That on August 9, 1901 and on August 14, 1901, a person giving his name as Theodore Grafe deposited in said First National Bank of Milwaukee the equivalent of German money aggregating $6420.00 to his credit upon account; that said sum has remained in said bank ever since, and at the date hereof with interest accrued thereon amounted to $6969.47.

III.

That the defendant Gerhard Terlinden and said Theodore Grafe mentioned in finding No. 2 are identical and the same person.

IV.

That the interpleaded defendant Augustus C. Umbreit, on March 21, 1904, commenced an action in this court against the defendant Terlinden for recovery for services rendered between August 16, 1901 and February 1, 1903; that no personal service of the summons therein was had on the said defendant; that said summons was served by publication only and without the mailing of a copy of the summons and of the complaint to said defendant; that said defendant did not appear therein; that on June 11, 1904, judgment was given in said action by default in favor of said Augustus C. Umbreit and against said defendant Terlinden for $7500 damages, no part whereof has been paid; that at the time of the commencement of said action process of garnishment was served, to-wit: on March 22d, 1904 on the garnishee First National Bank of Milwaukee as garnishee of said defendant Terlinden.

V.

That the defendant Terlinden at all the times set forth in finding number one was and still is a resident of Germany; that about July 11, 1901, he absconded from Germany and came to the state of Wisconsin and assumed the name of Theodore Grafe; that on August 16, 1901, he was apprehended as a fugitive from
79 justice upon extradition proceedings duly instituted against him, and was thereupon extradited to Germany.

VI.

That the above named plaintiff, The Disconto Gesellschaft, at all the times set forth in finding number one, was, ever since has been and still is a foreign corporation, to wit: of Germany, and during all said time had its principal place of business in Berlin, Germany; that the above named defendant, Augustus C. Umbreit during all said times was and still is a resident of the state of Wisconsin.

VII.

That on or about the 27th day of July, 1901, proceedings in bankruptcy were instituted in Germany against said defendant Terlinden and Paul Hecking appointed trustee of his estate in such proceedings on said date; that thereafter, and on or after August 21,

1901, the above named plaintiff The Disconto Gesellschaft was appointed a member of the committee of creditors of the defendant Terlinden's personal estate, and accepted such appointment; and that the above named plaintiff The Disconto Gesellschaft presented its claim to said trustee in said bankruptcy proceedings; that said claim had not been allowed by said trustee in January, 1902, and there is no evidence that it has since been allowed; that nothing has been paid upon said claim; that said claim so presented and submitted is the same claim upon which action was brought by the plaintiff in this court and judgment given, as set forth in finding No. 1; that said action was instituted by said plaintiff The Disconto Gesellschaft through the German Consul in Chicago; and that the steps so taken by the plaintiff The Disconto Gesellschaft had the consent and approval of Dr. Paul Hecking as trustee in bankruptcy so appointed in the bankruptcy proceedings in Germany; and that after the commencement of the same, the plaintiff The Disconto Gesellschaft agreed with said trustee that the moneys it should recover in said action should form part of the said estate in bankruptcy and be handed over to said trustee; that, among other provisions, the German bankrupt act contained the following: Sec. 14. Pending the bankruptcy proceedings, neither the assets nor any other property of the bankrupt are subject to attachment or execution in favor of individual creditors.

And the court finds as

80 *Conclusions of Law.*

I.

That the garnishee First National Bank of Milwaukee at the time of the service of the plaintiff's garnishee process, to-wit: August 17, 1901, was indebted to the defendant Gerhard Terlinden in the sum of $6420.00 and that such indebtedness now amounts, with interest, to $6969.47.

II.

That the plaintiff the Disconto Gesellschaft acquired a valid levy and lien upon said indebtedness of said garnishee First National Bank of Milwaukee.

III.

That the interpleaded defendant Augustus C. Umbreit acquired a valid levy and lien upon said indebtedness, subject to the levy and lien thereon acquired by the plaintiff.

IV.

That the plaintiff, the Disconto Gesel-schaft is entitled to judgment against the garnishee First National Bank for $6969.47, and against the interpleaded defendant Augustus C. Umbreit dismissing his answer upon the merits with costs.

V.

Let judgment be entered accordingly.
Dated December 23rd 1904.
By the Court,

LAWRENCE W. HALSEY,
Circuit Judge.

81 [Endorsed:] Circuit Court, Milwaukee County. Disconto Gesellschaft, Plaintiff, *vs.* Gerhard Terlinden, Defendant, First National Bank of Milwaukee, Garnishee, Augustus C. Umbreit, Interpleaded Defendant. Findings of Fact & Conclusions of Law. Copy. Filed Dec. 23, 1904 A. A. Wieber Clerk. Winkler, Flanders, Smith, Bottum & Vilas, Attorneys at Law, Milwaukee, Wis. Telephone Main 78.

82 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,
vs.
GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, Garnishee; AUGUSTUS C. UMBREIT, Interpleaded Defendant.

Now comes the above named plaintiff and excepts to so much and such parts of the fourth finding of fact in the above entitled cause as is in the words following: "that on June 11, 1904, judgment was given in said action by default in favor of said Augustus C. Umbreit and against said defendant Terlinden for $7500. damages."

Said plaintiff further excepts to so much and such part of the seventh finding of fact as is in the words following, to wit: "and on or after August 21, 1901, the above named plaintiff The Disconto Gesellschaf- was appointed a member of the committee of creditors of the defendant Terlinden's personal estate, and accepted such appointment;" and also excepts to so much and such part of said 7th finding of fact as is in the words following, to wit: "that said action was instituted by said plaintiff The Disconto Gesellschaft through the German Consul in Chicago, and that the steps so taken by the plaintiff The Disconto Gesellschaft had the consent and approval of Dr. Paul Hecking as trustee in bankruptcy so appointed in the bankruptcy proceeding in Germany; and that after the commencement of the same, the plaintiff The Disconto Gesellschaft agreed with said trustee that the moneys it should recover in said action should form part of the said estate in bankruptcy and be
83 handed over to said trustee."

And said plaintiff further excepts to so much and such part of the third conclusion of law as is in the words following, towit: "That the interpleaded defendant Augustus C. Umbreit acquired a valid levy and lien upon said indebtedness."

WINKLER, FLANDERS, SMITH
BOTTUM & FAWSETT,
Pl'ff's Att'ys.

84 [Endorsed:] Circuit Court, Milwaukee County. The Disconto Gesellschaft, Plaintiff, *vs.* Gerhard Terlinden, Defendant, First National Bank of Milwaukee, Garnishee, Augustus C. Umbreit, Interpleaded Def't. Plaintiff's exceptions to Findings. Filed Jan. 7, 1905. A. A. Wieber, Clerk. Winkler, Flanders, Smith, Bottum & Fawsett, attorneys at law, Milwaukee, Wis. Telephone Main 78.

85 Circuit Court, Milwaukee County.

DISCONTO GESELLSCHAFT, Plaintiff,
vs.
GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK, Garnishee; AUGUSTUS C. UMBREIT, Interpleaded Defendant.

And now comes the above named interpleaded defendant, Augustus C. Umbreit, and excepts to the findings in this action filed by Hon. Lawrence W. Halsey, who tried the issue herein, as follows:

1st. He excepts to the third finding as a conclusion of law, in so far as it finds that said interpleaded defendant acquired a valid levy and lien upon said indebtedness "subject to levy and lien thereon acquired by the plaintiff."

2nd. He excepts to the fourth finding as a conclusion of law and to the whole of said finding.

3rd. He excepts in the fifth finding as a conclusion of law and to the whole of said finding.

And said interpleaded defendant excepts to the conclusions of law generally, in this, that the same are contrary to law and not warranted by the findings of fact.

Dated this 4th day of January, 1905.

JOSEPH B. DOE,
Attorney for A. C. Umbreit, Interpleaded Defendant.

Filed Jan. 4th, 1905.

A. A. WIEBER, *Clerk.*

[Endorsed:] Def't Umbreit's exception to finding.

86 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,
vs.
GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, Garnishee; AUGUSTUS C. UMBREIT, Interpleaded Defendant.

The issues raised by the affidavit of garnishment and the answer of the garnishee and defendant thereto and the amended answer of the intervening defendant and the reply thereto, having been duly reached for trial before this court, the Honorable L. W. Halsey,

circuit judge presiding, and having been duly tried by said court on the second and third days of November, 1904, the plaintiff appearing by Winkler, Flanders, Smith, Bottum & Fawsett, its attorneys, the defendant Terlinden by A. C. Umbreit, his attorney, the garnishee First National Bank of Milwaukee by Miller, Noyes & Miller, its attorneys, and the interpleaded defendant Augustus C. Umbreit by J. B. Doe, his attorney, and the same having been duly submitted and counsel for the respective parties having been heard, and the court having duly made and filed its findings of fact and conclusions of law and ordered judgment accordingly:

Now therefore, on motion of Winkler, Flanders, Smith, Bottum & Fawsett, attorneys for the plaintiff,

It is hereby adjudged and decreed that the plaintiff the Disconto Gesellschaft do have and recover of the garnishee First National Bank of Milwaukee the sum of Sixty Nine hundred Sixty Nine 47/100 Dollars.

It is further ordered, adjudged and decreed that the answer of the interpleaded defendant Augustus C. Umbreit be and the
87 same is hereby dismissed upon the merits, and the plaintiff the Disconto Gesellschaft do have and recover of said interpleaded defendant, Augustus C. Umbreit, its costs and disbursements in this action taxed at the sum of $36.59.

Dated December 27th, 1904.

By the Court,

A. A. WIEBER, *Clerk.*

88 [Endorsed:] Circuit Court, Milwaukee County. Disconto Gesellschaft, Plaintiff, *vs.* Gerhard Terlinden, Defendant, First National Bank of Milwaukee, Garnishee, Augustus C. Umbreit, Interpleaded Defendant. Judgment. Filed 12/27/04. Filed and docketed Dec. 27, 1904 at 11 A. M. A. A. Wieber Clerk. Winkler, Flanders, Smith, Bottum & Vilas, Attorneys at Law, Milwaukee, Wis. Telephone Main 78.

89 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,

vs.

GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, Garnishee; AUGUSTUS C. UMBREIT, Interpleaded Defendant.

Whereas, judgement has been duly entered in the above entitled action adjudging, among other things, that the plaintiff recovered of the garnishee, the First National Bank of Milwaukee the sum of $6969.47; and recover its costs of the interpleaded defendant Umbreit; and

Whereas, the interpleaded defendant, Augustus C. Umbreit, has given notice that he intends to appeal from said judgment to the supreme court of the state of Wisconsin and has moved the court to stay execution thereunder pending such appeal; and

Whereas, the said garnishee, the First National Bank, of Milwaukee has no interest in the controversy between said Augustus C. Umbreit and said plaintiff and is desirous of being discharged from said judgment; and

Whereas, all the parties to this action have consented to this order:

Now, therefore, it is hereby ordered that said First National Bank of Milwaukee, garnishee aforesaid, do forthwith pay to the clerk of this court said sum of $6969.47 in full satisfaction and discharge of said judgment as against it.

It is further ordered that said clerk of said court shall immediately deposit said sum of $6969.47 upon certificate of deposit drawing not less than two and one half per cent. interest in said
90 First National Bank and hold said certificate and money until the final determination of the appeal which said defendant Umbreit intends to take from said judgment, or the further order of the court.

It is further ordered that if the said interpleaded defendant, Umbreit, shall duly perfect his appeal from said judgment within 30 days from the date hereof and shall execute and file an undertaking on appeal conditioned that he will pay all costs and damages which may be awarded against him on the appeal not exceeding $250. and further conditioned that if said judgment appealed from or any part thereof be affirmed he will pay the amount directed to be paid by the judgment or the part of such amount as to which said judgment shall be affirmed, if it be affirmed only in part and also all damages which shall be awarded against him upon the appeal and all damages which the plaintiff shall sustain by reason of the stay of execution of said judgment pending said appeal, including the difference between interest at the legal rate upon the amounts awarded to said plaintiff by said judgment and the interest that may accrue upon said sum of $6969.47 pending such appeal while on deposit in bank, not exceeding $500.00, then further execution of said judgment shall be stayed pending such appeal.

It is further ordered that if said interpleaded defendant, A. C. Umbreit, shall not perfect his said appeal and give the undertaking above required within the time above limited, then the clerk of this court is directed to endorse over and deliver to the plaintiff or its attorneys the certificate of deposit he is hereby required to procure and in the meantime a stay of execution of said judgment, not inconsistent with this order, is hereby granted.

Dated December 27, 1904.

By the Court,

LAWRENCE W. HALSEY,
Circuit Judge.

91 [Endorsed:] Circuit Court, Milwaukee County. The Disconto Gesellschaft, Pl'ff *vs.* Gerhard Terlinden, Def't First National Bank of Milwaukee, Garnishee, Augustus C. Umbreit, Interpleaded Def't. Order to Discharge First National Bank and Fixing Undertaking on Appeal to stay Execution. Copy. Rec. Copy Dec. 27, 1904 Miller, Noyes & Miller Att'ys for Garnishee. Joseph

B. Doe, Att'y for A. C. Umbreit. Winkler, Flanders, Smith, Bottum & Fawsett, Attorneys at Law, Milwaukee, Wis. Telephone Main 78. Filed Dec. 27, 1904 A. A. Wieber Clerk.

92 & 93 [Form No. 134.]

Notice of Appeal to Supreme Court—R. S. 3049.

Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,

vs.

GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, Garnishee; AUGUSTUS C. UMBREIT, Interpleaded, Defendant.

To Winkler, Flanders, Smith, Bottum & Fawsett, Attorneys for plaintiff, and A. A. Wieber, Clerk of the aforesaid court:

Please take Notice that the interpleaded defendant, Augustus C. Umbreit, hereby appeals to the Supreme Court of the State of Wisconsin from the judgment rendered by the Circuit court of Milwaukee county, in the action, above entitled, entered on the 27th day of December, A. D. 1904, in said court, in favor of the plaintiff and against the garnishee and the interpleaded defendant, and from the whole and every part of said judgment.

Yours, etc.,

JOSEPH B. DOE,
Attorney for Defendant Umbreit.

Dated Jan. 6th, 1905.

94 STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff and Respondent,

vs.

GERHARD TERLINDEN, Defendant; THE FIRST NATIONAL BANK OF MILWAUKEE, Garnishee; AUGUSTUS C. UMBREIT, Interpleaded, Defendant and Appellant.

Whereas, on the 27th day of December, A. D. 1904, in the Circuit Court of Milwaukee County The Disconto Gesellschaft, the above named respondent, recovered a judgment against The First National Bank of Milwaukee, garnishee, for sixty-nine hundred sixty-nine & 47/100 ($6969.47) dollars damages and against the above named appellant, Augustus C. Umbreit for thirty-six & 59/100 ($36.59) dollars costs, amounting in the aggregate to seven thousand six & 6/100 ($7006.06) dollars, damages and costs.

And the above named appellant feeling aggrieved thereby intends to appeal therefrom to the Supreme Court of the State of Wisconsin;

Now, therefore, the American Bonding Company of Baltimore

does hereby, pursuant to the statute in such case made and provided, undertake that said appellant will pay all costs and damages, which may be awarded against him on said appeal, not exceeding two hundred and fifty ($250.) dollars; and does also undertake that if the said judgment so appealed from, or any part thereof, be affirmed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which said judgment shall be affirmed, if it be affirmed only in part, and also all damages, which the plaintiff shall sustain by reason of the stay of
95 execution of the said judgment pending said appeal, including the difference between interest at the legal rate upon the amounts awarded to said plaintiff by said judgment and the interest that may accrue on said sum of sixty-nine hundred sixty-nine & 47/100 ($6969.47) dollars, pending such appeal, while on deposit in bank, not exceeding five hundred ($500.) dollars.

[SEAL.] AMERICAN BONDING COMPANY OF BALTIMORE,
By W. H. CHURCHILL, *Vice-Pres't.*

Attest:
THOMAS T. CHURCHILL, *Asst. Sec't'y.*

Certificate of Insurance Commissioner attached.

96 [Endorsed:] Copy. Circuit Court, Milwaukee County. The Disconto Gesellschaft, Plaintiff, *vs.* Gerhard Terlinden *et al.*, Defendants. Notice and Undertaking on Appeal. Hoyt, Doe, Umbreit & Olwell, Herman Building, Milwaukee, Attorneys for def't Umbreit. Copy Received Jan'y 9, 1905. Winkler, Flanders, Smith, Bottum & Fawsett, Attorneys for Pl'ffs. Service admitted Jan. 19, /05. A. A. Wieber, Clerk. Filed Jan. 19, 1905. A. A. Wieber, Clerk.

97 THE STATE OF WISCONSIN:

Circuit Court, Milwaukee County, *ss:*

THE DISCONTO GESELLSCHAFT, Plaintiff,
against
GERHARD TERLINDEN, Def't; FIRST NATIONAL BANK OF MILWAUKEE, Garn.; AUGUSTUS C. UMBREIT, Interpleaded.

STATE OF WISCONSIN, *Milwaukee County, ss:*

I, A. A. Wieber, Clerk of the Circuit Court, in and for the County of Milwaukee and State of Wisconsin, do hereby certify that the annexed and foregoing are the original papers which constitute the judgment roll, and order entered after judgment, notice of appeal and undertaking in the above entitled action, and that said papers are transmitted to the Supreme Court, pursuant to the notice of appeal hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 5th day of July A. D. 1905.

[SEAL.] A. A. WIEBER, *Clerk.*

98 [Endorsed:] Return on Appeal to the Supreme Court. Filed July 7, 1905. Clarence Kellogg, Clerk of Supreme Court, Wis.

99 Be it remembered that a term of the Supreme Court of the State of Wisconsin begun and held at the Capitol, in Madison, the seat of government of said State, on the second Tuesday, to-wit; on the ninth day of January, A. D. 1906, on the sixth day of the term, to-wit:

On the 30th day of January, A. D. 1906, Present, John B. Cassody, Chief Justice, John B. Winslow, R. D. Marshall, Joshua Eric Dodge, G. Siebecker and James C. Kerwin, Justices of said Court, the following proceedings were had, *Inter Alia*, to-wit:

THE DISCONTO GESELLSCHAFT, Respondent,

vs.

GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, Garnishee; AUGUSTUS C. UMBREIT, Intervenor and Appellant.

Appeal from Circuit Court, Milwaukee County, State of Wisconsin.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof,

It is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Milwaukee County in this cause be and the same is hereby reversed with costs against the said respondent taxed at the sum of Eighty-five and 25/100 dollars ($85.25).

And that this cause be and that the same is hereby remanded to the said Circuit Court, with directions to render judgment for the defendant Umbreit that he recover the sum garnished, with costs.

Chief of Justice Cassody Dissents.

STATE OF WISCONSIN, *Supreme Court, ss:*

I, Clarence Kellogg, Clerk of the Supreme Court, of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the Court in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

100 In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, this 19th day of April, A. D. 1906.

[SEAL.] CLARENCE KELLOGG,

Clerk of the Supreme Court of the State of Wisconsin.

101 [Endorsed:] State of Wisconsin, Supreme Court. The Disconto Gesellschaft, Respondent, *v.* Gerhard Terlinden, def't. A. C. Umbreit, Intervenor. Remittitur. Filed Apr. 20, 1906. A. A. Wieber, Clerk.

102 STATE OF WISCONSIN:

In Supreme Court.

THE DISCONTO GESELLSCHAFT, Respondent,
vs.
GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK, Garnishee Defendant; AUGUSTUS C. UMBREIT, Intervenor and Appellant.

SAME, Respondent,
vs.
AUGUSTUS C. UMBREIT, Impleaded with GERHARD TERLINDEN ET AL., Appellant.

The two actions above named, the first by way of garnishment and the second by way of creditors' bill to reach non-leviable assets, were consolidated for the purposes of trial, and from a judgment in favor of the plaintiff in each action the defendant Umbreit appeals.

The facts in the case were not in dispute, and were substantially as follows: The plaintiff is a banking corporation of the German Empire, having its principal banking house at Berlin; Gerhard Terlinden, the defendant in the main action, was and is a subject of the German Empire. In July, 1901, Terlinden absconded from Germany to this country, and was arrested at Milwaukee, August 16th, 1901, as a fugitive from justice in extradition proceedings, which proceedings afterwards resulted in his being extradited to Germany. In May, 1901, Terlinden had committed torts in Germany, by which the plaintiff bank had sustained damages amounting to nearly $100,000, and on August 17, 1901, the plaintiff commenced an action by personal service of a summons upon Terlinden in the Mil-
103 waukee Circuit Court to recover its damages for said torts, and at the same time garnished the First National Bank and the Marine National Bank of said city. The First National Bank answered admitting the previous deposit by Terlinden of two sums, aggregating $6,420; the Marine National Bank answered admitting the previous deposit by him of $5,000, for which it had issued to him a negotiable certificate of deposit in the usual form, which had not been returned. February 19, 1904, the plaintiff recovered judgment in the main action against Terlinden for $94,105.11.

The appellant Umbreit is, and was at all times named, a citizen and resident of Wisconsin, and rendered service for Terlinden beginning August 16, 1901, and ending February 1, 1903, and on March 21, 1904, commenced an action against Terlinden to recover for such services, in which action he obtained service by publication only; at the time of the commencement of such action he also garnished the defendants, First National Bank and Marine National Bank. Umbreit

obtained judgment against Terlinden in his main action by default, on June 11, 1904, for $7,500 damages; thereupon he intervened in the plaintiff's garnishee action against the First National Bank and claimed that his lien by garnishment was superior to that of the plaintiff.

April 1, 1904, the plaintiff brought an action in equity in the nature of a creditors' bill against Terlinden, the Marine National Bank, John C. Ames and Umbreit, the object of the action being to aid its lien by garnishment against the Marine Bank, and it demanded judgment that the $5,000 certificate of deposit, which was in the possession of the defendant Ames not endorsed, be subjected to the lien of its judgment against Terlinden, and that the claims of Umbreit and the other defendants be cut off. In this action a temporary injunction, preventing the transfer or payment of the certificate of deposit, was issued and served upon the defendants.
104 The defendant Ames surrendered the certificate into court and disclaimed title thereto; the defendant Umbreit answered setting up his own judgment and garnishment, and claiming that his lien thereby was superior to that of the plaintiff.

On or about July 27, 1901, proceedings in bankruptcy were instituted in Germany against Terlinden, and one Hecking was appointed trustee of the estate; on or about August 20, 1901, the plaintiff presented its claim to said trustee in bankruptcy, being the same claim upon which the main action was brought. The main action was commenced with the approval of the trustee Hecking, and after its commencement the plaintiff agreed with Hecking that all moneys he should recover in the action should form part of the estate in bankruptcy, and be handed over to trustee Hecking. It appears that the German Bankruptcy Act contains the following provision (sec. 14): "Pending the bankruptcy proceedings neither the assets nor any other property of the bankrupt are subject to attachment or execution in favor of individual creditors."

The garnishment action against the First National Bank, and the bill in equity against the Marine National Bank were thereupon consolidated and tried together, and the court upon the above facts awarded the money in both banks to the plaintiff.

WINSLOW, *J.*: The general question here presented is whether a non-resident and alien creditor may sue a non-resident and alien debtor in the courts of this state upon a cause of action accruing in a foreign country, and may by means of garnishment or other provisional remedy impound property of the debtor within the state, and obtain judgment permitting it to apply such property upon the debt when one of our own citizens is shown to be a creditor of the alien debtor and to have taken subsequent legal proceedings to impound the property for the payment of his claim. The general rule that all foreigners *sui juris* who are not specially disabled
105 by the law of the place where the suit is brought, may there maintain suits to vindicate their rights and redress their wrongs, is undoubted. Story on Conflict of Laws, 8th ed., sec. 565; 2 Cyc. pp. 107-108, art. "Aliens."

Resident alien friends are said to have practically the same rights and privileges, so far as the protection by law of their persons, liberty, reputation and property rights is concerned, as citizens; and to protect these rights they must possess the legal remedies necessary for their due vindication. Alien friends, whether resident or non-resident, also have, in the absence of disabling statutes at least, the right to take, hold, enjoy and dispose of property, real and personal, and to make contracts with residents, and so must have the right to invoke legal remedies to maintain these rights. In both cases the remedies are commensurate with the rights to be protected. The plaintiff, however, is within neither of these principles. It is a non-resident, it has no property of any kind within the state, it has made no contract within the state or with any resident of the state. It has brought action against another non-resident alien, temporarily within the state, to redress a wrong committed without the state, and it asks the courts of this state not only to give it judgment for that wrong, but also to lend the aid of its process to impound property within the state and satisfy such judgment therefrom to the prejudice of one of the state's own citizens who has a claim against the same debtor.

It is true that the cause of action is transitory and the parties both within the jurisdiction of the court, and so the court has jurisdiction and may doubtless rightly entertain the cause: but is the court compelled to do so because of an inherent right which the alien has to demand the action of the court; or does it do so upon the principles of comity, with the right to refuse relief when
106 such relief prejudices the interests of resident citizens? This is the initial question in the case, and the one upon which, as it seems to us, it must turn. In considering this question there should be no confusion of ideas as to the exact situation and relation of the various actions and proceedings. It must be kept in mind that the original action is between two non-resident aliens upon a foreign cause of action; the appeals in the present cases are from judgment in two auxiliary actions brought in aid of the main action, to impound property, which actions are in effect only proceedings to secure payment of the judgment in the main action by equitable execution upon non-leviable property. Had the property sought to be reached been tangible and leviable in its nature, writs of attachment and execution issued in the main action would have accomplished the same purpose. It is manifest, therefore, that if the main action cannot be maintained as matter of right, but only (if at all) on the principles of comity, the auxiliary actions or equitable proceedings in the nature of attachment and execution must fall under the same rule which applies to the main action out of which they spring, notwithstanding the fact that residents of the state may be parties to the auxiliary actions as stakeholders or claimants of the impounded property.

That the main action is not an action maintainable as a matter of right, but only upon the principles of comity, seems unquestionable.

This court has held that a resident of another state may sue another non-resident upon a transitory cause of action arising outside of this state, in our courts, as a matter of strict right. Eingartner *v.* Illinois Steel Co., 94 Wis. 70. This ruling was, however, based solely upon that provision of the Constitution of the United States which declares that "the citizens of each state shall be entitled
to all the privileges and immunities of citizens in the several
107 states." Sec. 2, Art. IV U. S. Constitution. It will be noticed that the present Chief Justice, though concurring in the result, disagreed with the court in that case upon this question, and took the position that the action could not be maintained as matter of right even under the constitutional provision named, but only upon the principles of comity. It is very manifest that had the case been one between alien non-residents, to whom the constitutional provision does not apply, the court would have taken the same view. It is not intended, however, to base the decision of this case upon a mere inference of this nature, nor is it necessary. The principle that an action between non-resident aliens upon a cause of action arising in a foreign country is entertained or not in the courts of this country as the principle of comity may dictate, is very well supported. It is said by Mr. Wheaton in his "Elements of International Law," (8th ed., edited by R. H. Dana), Part II, sec. 140: "It is the duty as well as the right of every nation to administer justice to its own citizens; but there is no uniform and constant practice of nations as to taking cognizance of controversies between foreigners. It may be assumed or declined at the discretion of each state, guided by such motives as may influence its judicial policy." Mr. Webster, in his argument in the case of Bank *v.* Primrose, defined the doctrine of comity as follows: "It is in general terms that there are, between nations at peace with one another, rights both national and individual resulting from the comity or courtesy due from one friendly nation to another. Among these is the right to sue in their courts, respectively." Vol. VI Webster's Works, p. 117. The principle is impliedly recognized in Mason *v.* Ship Blaireau, 2 Cranch, 240. This was a libel for salvage upon a French vessel which had been damaged in a collision on the high seas and brought into an American port by a crew put on her by an English vessel. All
the parties were foreigners, and a question as to the juris-
108 diction of the court was raised, and thus treated by Chief Justice Marshall, (p. 264): "These doubts (*i. e.* doubts as to the jurisdiction) seem rather founded on the idea that upon the principles of general policy this court ought not to take cognizance of a case arising entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court that whatever doubts may exist in a case where the jurisdiction is objected to, there ought to be none where the parties assent to it." It is very manifest that the case was entertained and decided not because the alien parties had a right to demand it, but because considerations of

public convenience seemed in that case to require it. Had considerations of public policy, convenience, or the protection of the interests of our own citizens been upon the other side of the question, it seems evident that the court would have refused to exercise its jurisdiction. This is really the principle of comity. It is a question of discretion in the exercise of power, not a question of the existence of the power itself, for that is admitted.

In an early case in New York it was said that while our courts may take cognizance of torts committed on the high seas on board a foreign vessel where both parties are foreigners, still "it must on principles of policy often rest in the sound discretion of the court to afford jurisdiction or not according to the circumstances of the case. To say that it can be claimed in all cases as matter of right would introduce a principle which might oftentimes be attended with manifest disadvantage and serious injury to our citizens abroad as well as to foreigners here." Gardner *v.* Thomas, 14 Johnson, 134. This doctrine was approved in Johnson *v.* Dalton, 1 Cowan, 543; Dewitt *v.* Buchanan, 54 Barb. 31; Olzen *v.* Schierenberg, 3 Daly, 100; and the doctrine was also held in that state to apply to actions between non-resident citizens of other states, (Burdick *v.* Freeman, 120 N. Y. 421), which as we have seen is contrary to the rule in this state as declared in the Eingartner case, *supra*.

The same rule as to foreigners is held in Michigan, (G. W. Railway Company *v.* Miller, 19 Mich. 305), where it was said that "where the parties are not residents of the United States and the trespass was committed abroad, the right of action in our courts can only be claimed as a matter of comity, and they are not compellable to proceed in such cases." See also Vol. 7 Am. L. Rev., p. 417, art. "Suits Between Aliens."

The doctrine is reasonable: in fact any other doctrine would seem to be an anomaly. The laws of a state are enacted primarily for the regulation, benefit and protection of persons, rights and property within its jurisdiction. To hold that two foreigners may import, bodily, a cause of action and insist as a matter of right that taxpayers, citizens and residents shall await the lagging steps of justice in the ante-room, while the court hears and decides the foreign controversy, seems on the face of it to be unreasonable, if not absurd.

Holding, therefore, that the main action in the present case, with its equitable auxiliary proceedings to impound non-leviable property, is to be maintained in the courts of this state (if at all) upon the ground of comity rather than upon the ground of right, we are to enquire what the general principles of comity are and what circumstances in the present case are to be considered in deciding whether the courts of this state should extend their aid to the plaintiff.

Comity is defined as: "Courtesy: a disposition to accommodate." By the rules of comity between nations, the courts of one state will voluntarily enforce the laws of a friendly state or nation when 110 by such enforcement they will not violate their own public policy or laws or injuriously affect the interests of their own state or of their own citizens.

While this court has not had occasion to consider the application of the principles of comity to an action between non-resident aliens upon a cause of action accruing abroad, like the present, it has passed upon cases involving other phases of the question, and has clearly recognized the principle and its limitations. Thus, in Mowry *v.* Crocker, 6 Wis. 326, this court held that a voluntary assignment of property for the benefit of creditors made in another state passes the title to personal property of the assignor within this state and will be given full effect by the courts of this state, and this ruling was followed in Cook *v.* Van Horn, 81 Wis. 291, and recognized in Segnitz *v.* G. C. B. & T. Co., 107 Wis. 171, as well as in Gilman *v.* Ketcham, 84 Wis. 60. But in McClure *v.* Campbell, 71 Wis. 350, it was held that an assignment of property made in another state pursuant to a law which amounts to a state bankrupt law has no extraterritorial effect, and will not be given effect by the courts of this state as to property within this state, and this doctrine has been subsequently approvingly cited in Filkins *v.* Nunnemacher, 81 Wis. 91; Wells *v.* Walsh, 87 Wis. 67; Hughes *v.* Hunner, 91 Wis. 116; and Segnitz *v.* G. C. B. & T. Co., *supra*. The vital distinction between the two principles is that in the first case the title to the property passes by act of the owner, which is effective as to personal property wherever situate, while in the second case the assignment is either actually or practically made by decree of the court or operation of law in proceedings *in invitum*, and hence it has no effect outside of the jurisdiction of the court. See also Smith *v.* C. & N. W. Ry. Co., 23 Wis. 267. It is well to note, however, that even in the first line of cases, where effect is given to the assignment in this state, the ruling is distinctly based upon the principle of interstate comity,
111 though the principle was not discussed at any length in any of the cases.

In Gilman *v.* Ketcham, 84 Wis. 60, the subject received attention in an opinion written by the late Mr. Justice Pinney, which is valuable and instructive. In this case it appeared that a New York manufacturing corporation had commenced proceedings in the courts of that state for its own voluntary dissolution, and had been adjudged insolvent and dissolved, and all its property, effects and credits transferred to the defendant Ketcham as receiver; that in course of the proceedings an order had been made enjoining all creditors of the corporation from commencing or prosecuting any actions against the corporation to collect their debts, which order had been served upon Gilman, who resided in New York; that the New York statute, under which the proceedings were brought, did not contemplate or provide for a discharge of the debtor, but simply for division of its property among its creditors and stockholders; that after the injunctional order aforesaid had been made and served Gilman commenced action in this state against the corporation, and garnished one of its creditors in this state, who brought the money into court, and Ketcham was thereupon interpleaded and made claim to the fund by reason of the facts above stated.

In this case it was held that the effect of the voluntary dissolution proceedings in New York was to place all of the corporate property

and assets in *custodia legis*, to be collected and applied by the receiver; that there was nothing in the proceeding or the statutes of New York in contravention with the law or public policy of this state, and that to give effect to such proceedings would not prejudice the rights of any citizen of this state. On these grounds the claim of the receiver was recognized and upheld upon the principles of comity, as against the plaintiff who was seeking the aid of the courts of this state in violation of the law, and evading the process
112 of his own state. In discussing the question it was said: "Our own citizens, in a proper case, would no doubt be protected against the effect of such extra-territorial act and adjudication, if injurious to their interests or in conflict with the laws and public policy of Wisconsin, and effect would not be given to it at the expense of injustice to our own citizens." This was not a chance remark, but a careful statement of the principle of comity as applied to the case before the court, and was thoroughly supported by citations of and quotations from the authorities, which need not be repeated here. This case has since been cited with approval in Hughes *v.* Hunner, 91 Wis. 120; Parker *v.* Stoughton Mill Co. 91 Wis. 180; Wyman *v.* Kimberly Clark Co., 93 Wis. 559; Finney *v.* Guy, 106 Wis. 256; and by the present Chief Justice in his concurring opinion in Eingartner *v.* Ills. Steel Co., 94 Wis. 84, where he also says: "Actions like the one at bar (which was an action by one non-resident against another for a tort committed in Illinois) are generally governed by the principles of interstate comity."

In Finney *v.* Guy, *supra*, it is said in the opinion of Mr. Justice Marshall: "This court recognizes fully the importance of interstate comity, and uniformly freely gives effect to it as regards the laws of sister states when it will not seriously violate the policy of our own laws or the rights of our own citizens; * * * a liberal course in the enforcement of the laws of other states in proper cases should be the rule, but the paramount duty of our judicial system is to safeguard our own state policy and prevent injustice to our own people within reasonable limits." Op. pp. 276-277. Upon these principles, then, we are to determine whether the plaintiff should be allowed by the courts of this state to take the moneys which it has impounded, and in determining this question a brief reference to the facts at this point will be helpful.

Terlinden committed a tort (the nature of which does not
113 appear) against the plaintiff in Germany, in May, 1901, and fled to this country, bringing the money in question and depositing it in bank; it appears to have been his own money, at least there is nothing before us to show to the contrary; the intervenor, Umbreit, began to render services to Terlinden (the nature of which does not appear) on August 16, 1901, and continued to render services until February 1, 1903, when his bill amounted to $7,500, which has not been paid; the plaintiff commenced suit against Terlinden to recover damages for said tort, August 17, 1901, and obtained judgment for more than $94,000, February 19, 1904, more than $85,000 thereof being still unpaid; at the time of commencing suit it garnished the banks; Umbreit brought action against Ter-

linden in March, 1904, and garnished the banks, obtained service by publication, and was given judgment by default in his main action for $7,500, June 11, 1904; Terlinden was thrown into involuntary bankruptcy in Germany, July 27, 1901, and the plaintiff has taken part in the proceedings; the German law prohibits the creditor of a bankrupt from seizing the bankrupt's property by attachment or execution pending the bankruptcy proceedings; the plaintiff, after the commencement of its action, agreed with the trustee in bankruptcy that it would hand over all moneys it might recover in the action to the trustee to go into the general estate.

It may be admitted that there is nothing contrary to our laws or public policy in the prosecution of an action by a foreigner against another to recover damages for a tort committed abroad, provided that the legal business of citizens is not materially interfered with thereby. The policy of our laws is to give every man a certain and efficient remedy in the courts for the wrongs which he may suffer. It may be admitted also that by the mere prosecution of the action to judgment in the present case, no interest of the public, nor
114 of any of our citizens was prejudiced. But the plaintiff was not content simply to prosecute his action to judgment. At the inception of his action he asked and obtained the help of the court to seize and hold property of the defendant within the jurisdiction of the court, to answer the demands of its expected judgment. At this very time Terlinden was indebted to Mr. Umbreit, a citizen of our own state, in some amount and evidently upon a contract for continuous service. There is nothing in the record to impeach the *bona fides* of that debt or service. Before the plaintiff obtained any judgment on its claim, Umbreit's claim become large; action was begun upon it in March, 1904, the same property impounded by garnishment, and in June, 1904, judgment was obtained. Thereupon Umbreit intervened in the plaintiff's garnishment action and thus the foreigner and the citizen were brought face to face, each demanding the aid of the court in subjecting the funds in bank to the payment of its claim in preference to the other. If the foreigner was entitled to maintain his action, and prosecute all the statutory auxiliary remedies as matter of right, his present claim would have to be sustained, because he obtained the prior lien by garnishment, (so far at least as the funds in the First National Bank are concerned), but being only entitled to ask the help of the court on the ground of comity he must necessarily only take such help as the rules of comity will give. It is confidently believed that no court in such case ever has allowed or should allow the foreigner to seize and carry away property within the jurisdiction when a resident creditor stands also at the bar with his judgment and his provisional lien, and thus force such resident creditor to go to a foreign country to collect his debt. If such action be not prejudicial to the rights and interests of our citizens it is difficult to see what action would be prejudicial. Nor does it make any difference that the home creditor's claim may have accrued after that of the foreign creditor;
115 the question is not to be determined by priority of time any more than by priority of garnishment, but by the situation

at the time when the court is called upon to finally decide which creditor shall receive its aid. So, if the case were devoid of any other facts, comity would require that the interests of the home creditor be protected. But there are other facts which have a material bearing. The foreign creditor is here nominally in his character as a creditor, but really as the mere agent of the foreign trustee in bankruptcy who could not himself come here and assert any right to the property. The creditor has agreed to hand over to the trustee for general distribution all that he may recover in this action. Thus it is proposed by the aid of our courts to set at naught the policy of our own law to the effect that a foreign trustee or receiver in involuntary bankruptcy proceedings obtains no title to the debtor's property within this state. This is certainly imposing upon good nature, and comity is after all simply good nature.

So we reach the conclusion that so far as the case against the First National Bank is concerned, the judgment is erroneous and should have been in favor of the intervenor.

As to the equitable action in aid of the garnishment against the Marine National Bank, while the general principles of comity already discussed are equally applicable, there are some further considerations. In this case neither party obtains any lien on the fund by reason of the attempted garnishments, because it was represented only by a negotiable instrument which the bank had issued to Terlinden. Wis. Stats. 1898, sec. 2769, subd. 1. The equitable action was, therefore, brought by the plaintiff, to which Umbreit was made a party, in order to reach the indebtedness represented by the negotiable instrument and subject it to any judgment which might be obtained in the main action. At the time this action was brought
Umbreit had brought his action against Terlinden, obtained
116 service by publication only, and had attempted to garnish
the Marine National Bank, but had obtained no judgment. In the complaint in the equitable action the plaintiff alleged that Umbreit claimed a lien on the instrument by reason of his subsequent garnishment of the bank, but alleged that such garnishment was without validity and without jurisdiction, and therefore prayed that Umbreit's lien be cut off. Umbreit answered claiming an indebtedness of Terlinden to him of $7,500, as aforesaid, and setting up the commencement of his action therefor, and his garnishment of the Marine Bank. The court found that Umbreit commenced his action and obtained service by publication only; that he obtained his judgment by default for the full amount claimed, but made no findings as to the merits of Umbreit's claim. The court also found that Umbreit at the commencement of his suit served garnishment process on the Marine National Bank, but concluded that as the only liability of the Marine Bank arose by reason of the issuance of a negotiable instrument to Terlinden no lien thereon or on the liability of the bank was secured by either plaintiff's or defendant's garnishment proceedings.

There is no bill of exceptions in the case, and hence the findings of fact are solely to be considered, and by them we are only informed that Umbreit obtained judgment by default upon substituted service

of the summons, and the question has occurred to us (though not suggested in the briefs) whether such a judgment constitutes any proof that any sum was owing from Terlinden to Umbreit; in other words, is the judgment itself proof of personal liability, especially when the parties are litigating their rights before a court of equity? The validity and justice of the plaintiff's judgment in the main action cannot be questioned, because it was rendered after personal service of the summons and is unappealed from, but the defendant Umbreit has no such judgment and is not found, as matter of
117 fact, to have had any claim against Terlinden except his judgment obtained by default on substituted service. When he comes into a court of equity and makes his affirmative claim for priority of right in property which the plaintiff had in form equitably impounded and upon which he (Umbreit) had no actual lien, must there not be a finding that he actually had a just claim in order to justify the court in protecting him? Is his judgment any proof of his claim against Terlinden, except as to property garnished or attached? The principle is familiar and well settled that in an action against a non-resident, where there is only substituted service of the summons, the court acquires no jurisdiction for mere purposes of personal adjudication, but only to enter a judgment with reference to or to be enforced upon property within the state or a judgment concerning the status of one of our own citizens. Moyer *v.* Koontz, 103 Wis. 22; Pennoyer *v.* Neff, 95 U. S. 714. The judgment in such action will, of course, be effective so far as it affects or may be enforced against the property of the defendant which has actually been seized by attachment or garnishment. It has also been held by this court, contrary to the rulings in some jurisdictions, that it is not essential that the property within the state be seized by writ of attachment, but that if the facts required by the statute to authorize the order for publication, appeared by proper affidavit, the court would acquire jurisdiction to render a judgment good at least against the property described in the moving papers, providing it has not been removed from the state or sold to an innocent purchaser before the rendition of the judgment. Jarvis *v.* Barret, 14 Wis. 591; Gallun *v.* Weil, 116 Wis. 236. But it was further held, prior to the passage of Chapter 29 Laws of 1868 (Sec-. 13, 14, 15 of chapter 124 Taylor's Statutes) that the property within the state must be specifically described in the moving affidavit upon which the order of publication is based or the court will acquire no jurisdiction. Winner *v.*
118 Fitzgerald, 19 Wis. 393. The property so described need not be property which can be attached, but may be such property which can only be reached by creditor's bill, such as debts owing by a resident to a non-resident, and it is now sufficient if it be described in the complaint. Bragg *v.* Gaynor, 85 Wis. 468.

The act of 1868, above named, as codified by subd. 1 of sec. 2639 R. S. 1878 added a new class of cases in which service by publication was authorized, namely, cases where the cause of action arose in this state and the court has jurisdiction of the subject of the action. In Witt *v.* Meyer, 69 Wis. 595, this court expressed a grave doubt whether in such case the court would obtain any jurisdiction either of

person or property unless it also appeared by the affidavit that the defendant had property in this state which was described, citing, in addition to Jarvis *v.* Barrett, Rape *v.* Heaton, 9 Wis. 328, and Jones *v.* Spencer, 15 Wis. 583. Just previous to this decision it had been held, in Smith *v.* Grady, 68 Wis. 215, that a foreign personal judgment founded alone upon service of process outside of the jurisdiction, there being no property within that jurisdiction was absolutely void, citing Jarvis *v.* Barrett, *supra.*

In view of the doctrine announced by the Supreme Court of the United States in Pennoyer *v.* Neff, 95 U. S. 714, which is a leading case on this subject, and which was cited with approval by this court in Moyer *v.* Koontz, *supra,* we think it must be considered as settled that the doubt expressed in Witt *v.* Meyer, was well founded, and that such judgments, except those affecting the status of a citizen, can go no farther than to be effective as to property within the state at the time of the commencement of the action, which property must be described in the moving papers.

Now, it does not appear in the findings in the present case that the debt from the Marine Bank to Terlinden was named or described in the papers upon which the order of publication was based.
119 It is true that it appears that judgment was entered in the action, and it may be claimed that the presumption of regularity in the proceedings of a court of general jurisdiction should be indulged in. The difficulty with this claim is that it appears that Mr. Umbreit did have a valid assignment of the funds in the First National Bank, which he acquired at the time he commenced his suit, and this would fully justify the court in entering the formal judgment in the main action, so the office of any presumption seems very doubtful at best.

We conclude that in the case of the creditor's bill against the Marine Bank the mere finding that a judgment was obtained by Umbreit by default upon substituted service is insufficient to authorize this court to hold that any jurisdiction was obtained of the debt due from the bank, because it does not appear affirmatively that in that action this property was described in the affidavit or complaint on which the order of publication was based.

In view of the fact that this point seems to have been overlooked in the trial of the case judgment will not be directed here; nor, on the other hand, will a new trial of the case be ordered. The Marine Bank case will be sent back with directions to allow the defendant Umbreit to introduce proof showing that the debt due from the Marine Bank was properly described in the affidavit or complaint upon which the order for publication was based, in which event his judgment will be given preference over the plaintiff's claim to the full amount thereof; in case, however, such was not the fact he should be allowed to introduce extrinsic evidence of the amount justly and equitably due him, and the plaintiff should be allowed to meet such claim by evidence to the contrary, and the amount found by the court to be justly due Mr. Umbreit over and above what he may actually realize from the judgment in the garnishment action should be given preference, after which the plaintiff's claim
120 should be allowed.

By the COURT: The judgments in both actions are reversed with costs; the garnishment action is remanded with directions to render judgment for the defendant Umbreit that he recover the sum garnished with costs; the equitable action is remanded to take further proof and for judgment in accordance with the opinion.

121 STATE OF WISCONSIN, *Supreme Court:*

I, Clarence Kellogg, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original Opinion of the court by Justice Winslow on file in my office in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, the 19th day of April, A. D. 1906.

[SEAL.] CLARENCE KELLOGG,
Clerk of the Supreme Court of Wisconsin.

Filed April 20, 1906.

A. A. WIEBER, *Clerk.*

[Endorsed:] Certified Copy of Opinion of Justice Winslow. Filed Apr. 20, 1906. A. A. Wieber, Clerk.

122 STATE OF WISCONSIN:

In Supreme Court.

No. 45.

THE DISCONTO GESELLSCHAFT, Respondent,
vs.
GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, Garnishee; AUGUSTUS C. UMBREIT, Intervenor and Appellant.

And now comes The Disconto Gesellschaft, the respondent in the above entitled cause, and moves the court for a rehearing thereof.

Arguments will be served and filed according to the rule in such case made and provided.

WINKLER, FLANDERS, SMITH,
BOTTUM & FAWSETT,
Attorneys for Respondent.

F. C. WINKLER,
Of Counsel.

Filed May 26, 1906.

A. A. WIEBER, *Clerk.*

123 [Endorsed:] State of Wisconsin, in Supreme Court. 45. The Disconto Gesellschaft, Respondent, *vs.* Gerhard Ter-

linden, Defendant, First National Bank of Milwaukee, Garnishee, Augustus C. Umbreit, Intervenor and Appellant. Motion for Rehearing. Filed Feb'y 28, 1906. Winkler, Flanders, Smith, Bottum & Fawsett, Attorneys at Law, Milwaukee, Wis. Telephone Main 78.

124 STATE OF WISCONSIN:

In Supreme Court.

No. 45.

THE DISCONTO GESELLSCHAFT, Respondent,
vs.
GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, Garnishee; AUGUSTUS C. UMBREIT, Intervenor and Appellant.

You are hereby notified that the respondent in the above entitled cause filed a motion for a rehearing therein on the 28th day of February, 1906, and that there is herewith served upon you a copy of a printed argument in support of said motion, which will be submitted to said court on the 19th day of March, 1906.

Dated March 8th, 1906.

Yours &c.,

WINKLER, FLANDERS, SMITH,
BOTTUM & FAWSETT,
Attorneys for Respondent.

To Joseph B. Doe, Esq., Attorney for Appellant, and Messrs. Hoyt, Doe, Umbreit & Olwell, Of Counsel for Appellant.

125 [Endorsed:] State of Wisconsin, in Supreme Court. The Disconto Gesellschaft, Respondent, *vs.* Gerhard Terlinden, Defendant, First National Bank of Milwaukee, Garnishee, Augustus C. Umbreit, Intervenor and Appellant. Notice of Motion. Served March 9, 1906. Winkler, Flanders, Smith, Bottum & Fawsett, Attorneys at Law, Milwaukee, Wis. Telephone Main 78.

126 STATE OF WISCONSIN:

Supreme Court.

No. 45.

THE DISCONTO GESELLSCHAFT, Respondent,
vs.
GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK, Garnishee; AUGUSTUS C. UMBREIT, Intervenor and Appellant.

No. 46.

THE DISCONTO GESELLSCHAFT, Respondent,
vs.
GERHARD TERLINDEN, MARINE NATIONAL BANK and Others, Defendants; AUGUSTUS C. UMBREIT, Appellant.

Argument for Re-hearing.

Winkler, Flanders, Smith, Bottum & Fawsett, Attorneys for Respondent.
F. C. Winkler, Of Counsel.

Filed March 19, 1906.
CLARENCE KELLOGG, *Clerk S. C.*

127 STATE OF WISCONSIN:

Supreme Court.

No. 45.

THE DISCONTO GESELLSCHAFT, Respondent,
vs.
GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK, Garnishee; AUGUSTUS C. UMBREIT, Intervenor and Appellant.

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Argument for Re-hearing.

We realize that the court has given much time and attention to this case and would be reluctant if it were one of ordinary importance, to press for further consideration.

But we have here a case of transcendent interest—a deli-
128 cate question of International Law, which is decided against a foreigner on the ground that he is a foreigner—and we cannot consider our duty to the interests entrusted to us done without urging what we believe to be controlling considerations which do not seem to have received the weight to which they are entitled.

The decision made takes position upon a broad general principle and makes an application of it for which there is not claimed to be a precedent. This, of course, is not saying that it is not sound. But it admonishes us to look closely to its soundness.

I.

We accept the position of the court that the right of the plaintiff to pursue its absconding debtor into this country and to invoke the latter's remedial processes against him rests upon the comity of nations. It is the comity of the sovereignty, not of the court.

Wharton Conflict of Laws, section 1*a*.

What is this comity? Is it a thing that can be given or withheld at will? This will not be claimed. Rather, let us say, it is a sacred duty resting on considerations of mutual confidence and reciprocal justice. Civilization demands its exercise where justice requires it. It cannot be denied, we submit, in whole or in part, except on clear, clean principles of justice.

The opinion refers to the rights accorded to "resident alien friends" and to "alien friends whether resident or non-resident," who have property here or contracts with residents. Their
129 rights too rest on comity. Yet it seems to be conceded that in protecting them the courts will accord the full benefit of the law of the land. Then it is added:

"The plaintiff, however, is within neither of these principles. It is a non-resident. It has no property of any kind within the state. It has made no contract within the state or with any resident of the state. It has brought action against another non-resident alien temporarily within the state to redress a wrong committed without the state, and it asks the courts of this state not only to give it judgment for the wrong but also to lend the aid of its process to impound property within the state and satisfy such judgment therefrom."

All of the above is true, but it is not all the truth. *The plaintiff does not bring a foreign controversy to our courts by choice.*

We beg to submit that no stronger case appealing to our courts for extending to the plaintiff all the rights which our statutes give to litigants, with the benefit of incidental advantages which accrue from their processes, than the one at bar can be presented.

Here is a confessed absconding debtor and fugitive from justice. He flees to our shores seeking to hide his person from his government and his property from his defrauded creditors under an assumed name.

International treaties compel the extradition of his person. The property with which he has absconded he places under the jurisdiction of American law. No other law can reach it. He has no cred-

itors but foreigners. Are they helpless? They have no redress
130 except as they may find it under the laws of the land to which their debtor has fled, in which he has placed it for hiding.

And do not the inexorable demands of International justice require that that country shall throw open its courts of justice to these creditors, with all processes devised by its statutes for the impounding of a debtor's property and the collection of debts? Can the comity of nations, which must rest on moral principles, be satisfied with anything less? Is this a mere act of grace or "good nature," or is it not rather a duty which a civilized country owes to civilization? It may rest on comity but comity imposes duties. This is recognized in the definition quoted from Mr. Webster in the opinion of the court. The duty to do as you would be done by obtains between nations as it does between individuals. The most sacred of duties rest on moral grounds, not on compulsion.

Where, therefore, the situation is such that a foreigner is, without his fault, compelled to resort to our laws for justice, should it not be awarded to him on the same enlightened principles which are enacted for our own citizens and yielded to resident aliens? Is not this the practice of enlightened nations?

In Story on Conflict of Laws, section 542, it is said that "there are nations" which refuse to take cognizance of controversies between foreigners; but it is added: "In England and America, on the other hand, suits are maintainable and are constantly maintained between foreigners where either of them is within the territory of the state in which the suit is brought."

The same, of course, is true of Germany. The German law
131 is liberal. It opens its courts to the foreigner, giving him resort to all its legal remedies, subject only to security for costs, and of this he is relieved if the laws of his own country do not require it of foreigners. He may also sue *in forma pauperis* if the laws of his own country give that privilege to Germans. Foreign creditors stand on the same footing with home creditors in insolvency proceedings except that this may be denied them by the *Bundesrat* in retaliation.

Lexikon des Deutschen Rechts, by Joseph Kuerschuer; sub nomen "Auslaender."
Civilprozessordnung, Sections 53, 102, 106.
Konkursordnung, Section 5.
See also *Entscheidungen des Reichgerichts in Civilsachen,* Vol. 14, p. 409.

Wharton's Conflict of Laws (3d Ed.) says:

"Sec. 705. In Germany, England and the United States the courts as a general thing make no distinction, so far as jurisdiction is concerned, between cases in which parties are foreigners and those in which they are subjects."

Do the circumstances of the present case warrant a disturbance of this amiable rule between these leading friendly nations?

So constant and uniform is the practice of lending their judicial

remedies and processes by civilized nations to foreigners who are driven to them for the protection of rights that it is not generally in express words provided for in treaties. It goes *sua sponte*. But it is sometimes done. There was the treaty of the United States with the little German kingdom of Hanover in 1840. Article I. 132 relates to the rights of the respective citizens in the foreign state. It provides, among other things, the following:

"They shall have free access to the tribunals of justice in their litigious affairs *on the same terms which are granted by the law and usage of the country to native citizens and subjects,* for which purpose they may employ in defense of their rights such advocates, attorneys and other agents as they may judge proper."

This provision is repeated in Art. X. of the Treaty of 1846. *Public Treaties,* (*Govt. Printing Office,* 1875), pp. 388-394.

It was in 1847 extended to other German principalities. *Ibidem,* pp. 470, 578.

These treaties became extinct when Hanover became part of Prussia in 1866. But can it be for a moment supposed that the United States by this treaty granted to the subjects of the Kingdom of Hanover a right by the above provision that it did not concede to be the due by International Comity of all subjects of friendly European nations? Or can it be supposed that with the absorption of Hanover by the greater kingdom these rights of Hanoverian subjects ceased to exist? Is it not more consonant with reason to conclude that the rights here expressly given are nothing more than what was intended by the treaties of amity and friendship between the United States and Prussia? In 1828 the latter kingdom contracted a treaty with the United States which in its preamble recited "the relations of good understanding which had so happily subsisted" between their respective states, and the desire of "consolidating commercial 133 intercourse between them," and the conviction "that this object could not better be accomplished than by adopting a system of entire freedom of navigation, and a perfect reciprocity, based upon principles of equity equally beneficial to both countries." Article I. is as follows:

"There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective states shall mutually have liberty to enter the ports, places and rivers of the territories of each party wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs; and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing." *Ibid.,* p. 656.

This treaty secures to Germans the full right to sojourn in this country in order to attend to their affairs. It gives to them the same security and protection given to natives. Does not its aim and purpose clearly include the security and protection to a subject of Germany who is by a stress of circumstances driven to our jurisdiction

for the assertion of his rights? Is he not here, whether in person, or by attorney, "in order to attend to his affairs"?

It is certainly legitimate business. Should he not have the protection of the law of the land?

The treaty of 1799 between the same parties had contained the following provision in Article VII.:

"Each party shall endeavor by all the means in their power to protect and defend all vessels and *other effects* belonging to
134 the citizens or subjects of the other which shall be *within the extent of their jurisdiction by sea or by land.*" *Ibid.*, 650.

These treaty provisions are to be liberally construed. On this subject the Supreme Court of the United States in Tucker *vs.* Alexandroff, 183 U. S., 424, on p. 437, said:

"We think, then, that the rights of the parties must be determined by the treaty, but that this particular convention being operative upon both powers and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides,* and in a manner to carry out its manifest purpose. Taylor on International Law, Sec. 383. As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence. It is said by Chancellor Kent in his Commentaries (Vol. 1, p. 174): 'Treaties of every kind are to receive a fair and liberal interpretation according to the intention of the contracting parties, and are to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts.'"

The State of Wisconsin in its legislation gives no countenance to the exclusion of the foreigner from prosecuting for his
135 just demands. It opens its courts to foreigners and natives alike. It holds out to each the same redress by suit with the same provisional remedies which give a lien from the time of service.

The foreigner suing in this country must sue under the *lex fori.* 22 Am. & Eng. Enc. of Law, p. 1388.

It would seem to follow inevitably that he becomes entitled to the results which the law of the *forum* attaches to the process employed. Hence, we believe it to be true that wherever the priority of attachments of property levied on by different creditors, as the property of the same debtor, has heretofore been drawn in question, it has unvariably been determined (in the absence of any claim of fraud) by the time when the respective liens attached. No question of nonresidence or of foreigner has ever played a part in these cases.

All rights asserted derive their virtue from the domestic law. They can have only the effect and it would seem must have the effect

which the law of their creation enacts. There is no question here of the effect to be given to a foreign law.

In the numerous cases where questions between an attaching or garnishing creditor on the one hand and an assignee on the other have been considered, the two parties rested their respective claims on the laws of different countries.

It is not so here where each has an attachment lien deriving its virtues from the same statute of the same state.

The decision in the case at bar, as we understand it, concedes this position and holds that the weakness of the plaintiff as against
136 the intervenor lies in the fact that the main action of the plaintiff (a foreigner) against the defendant, (a foreigner), can only be maintained in this state as an act of grace, and it and all its incidents (including the garnishment) can therefore be suspended by the court in its discretion, and ought to be so suspended and subjected to the intervenor's claim upon the facts in this case.

If this case were like Eingartner *vs.* Illinois Steel Co. (or rather, as that case would have been if both parties had been citizens of Canada instead of Illinois), one which could be perfectly and fully and in all respects effectually litigated and disposed of in the parties' own country, and was brought here purely by caprice of the plaintiff, we should say that the court was unquestionably right.

But when the fact is that the defendant, fleeing from his own country, has placed himself and his property where only American law can reach them, we submit that the comity of nations, which is International justice, requires of the United States that it afford to the foreign plaintiff the same rights of action which its own citizens enjoy, and that the courts of every state of the Union should lend their aid to this end. Courts of the United States could not under such circumstances *refuse* their jurisdiction without violating international obligation.

The cases cited in the opinion in no way conflict with this contention.

Gardner *vs.* Thomas, 14 Johnson, 134, was a case where a British seaman bound on a continuous voyage back to his own country, while the ship touched at New York brought an action in Justice's Court for an alleged assault committed by his master on the
137 high seas. It was held that the jurisdiction should not be entertained. "Mariners might so annoy the master of a vessel as to break up the voyage and thus produce great distress and ruin to the owners."

Jurisdiction was here refused in consideration of the interests of foreign commerce. Both plaintiff and defendant being on their return to their own country were left to litigate their differences there.

In Johnson *vs.* Dalton, 1st Cowen, 543, jurisdiction for an assault and battery on the high seas was entertained.

In DeWitt *vs.* Buchanan, 54 Barb. 31, "an ordinary case of assault and battery committed in Canada, both parties still residing there," Mr. Justice James struck the principle for which we contend in these words:

"Foreigners should not be invited to bring their matters here for litigation. But if a foreigner flee to this country he may be pursued and prosecuted here." (p. 33.)

Olson *vs.* Schierenberg, 3 Daly, 100, was an action by a cabin boy against a master and mate of a foreign ship for cruel treatment during a voyage. It was ruled for the defendants on the merits. It was also held that where the seaman had bound himself by his shipping articles not to bring any dispute or quarrel with the master or his substitute before any court but that of his own country, foreign tribunals would give effect to such stipulation unless the voyage *as respects the plaintiff* was brought to an end at the foreign port without wrong on his part.

None of these cases certainly is a precedent for refusal to
138 give full and due redress according to our laws to the plaintiff in the present case.

Much more might be said and urged upon this subject. We do not pretend to exhaust the argument on this motion. The theory on which the court has rested its decision was not mentioned in the appellant's brief. It was not developed at the argument. It has not had the advantage of that full elucidation which a discussion from every standpoint would give.

II.

But it is said:

"But there are other facts which have a material bearing. The foreign creditor is here nominally in his character as a creditor but really as the mere agent of the foreign trustee in bankruptcy who could not himself come here and assert any right to the property. The creditor has agreed to hand over to the trustee for general distribution all that he may recover in this action. Thus it is proposed by the aid of our courts to set at naught the policy of our own law to the effect that a foreign trustee or receiver in involuntary bankruptcy proceedings obtains no title to the debtor's property, within this state."

Is this a full and accurate statement? Is it true that the plaintiff sues as the agent of the foreign receiver? Is it not unquestioned that it sues in its own right as a creditor?

The plaintiff, we submit, has done nothing in any way to defy or circumvent the doctrine of this court that it will not recognize title to property in this state by virtue of a foreign involuntary assignment.

That doctrine rests upon a single point—a point of law,
139 viz.: that the transfer is by operation of the foreign law only and that that law by reason of its want of extra-territorial force cannot confer title as to property not within its jurisdiction. There is certainly no policy in this state to keep the property from "general distribution."

It is not only entirely consistent with, but it is the consequence of the doctrine stated, that the creditors of the foreign bankrupt must in this country, to get at the debtor's property here, prosecute their

own claims and obtain title through the process of our courts. If the plaintiff has an honest claim, that certainly cannot be denied him.

Now if that claim is thoroughly honest as against both the defendant and the intervenor, can either of them complain, or is the majesty of the law of Wisconsin offended because the plaintiff has generously promised that if he succeeds to get this Wisconsin money he will divide it or put it where it will be divided *pro rata* among all the creditors alike?

It does not change or affect the state of title of the property in Wisconsin. The plaintiff seizes it by reason of his character as a *bona fide* creditor under the authority conceded to it as such by the laws of Wisconsin. The law of Wisconsin cannot recognize the title of the assignee simply because there is none. The act of law which made him an assignee could not and did not transfer the property beyond its jurisdiction. It is on this ground alone and not on any ground of policy that the assignee cannot possess himself of it.

The agreement which the plaintiff made in this respect was made after the action was commenced. It was either a naked promise without consideration, a mere pious intent, which can be re-
140 pented of and withdrawn, or it was for a valuable consideration. If it was the former, it can certainly have no effect. If it was the latter, it was an assignment of the plaintiff's claim. Plaintiff has an unquestionable right to assign its claim and its assignee, whoever he might be, would succeed to its rights and have the right to prosecute the suit to its end in the assignor's name.

Wisconsin Statutes, Sec. 2801.

Our state fully recognizes the title of a foreign *voluntary* assignee. This is evidence, if such were needed, that there is no policy of state against an assignee as such, or against general distribution. The doctrine referred to is no more than this, that the foreign law being inoperative here, property in this state must be treated as the property of the debtor and proceeded against under the laws of this state as such.

III.

The opinion, speaking of the plaintiff's cause of action, says that "Terlinden committed a tort, *the nature of which does not appear.*" We are not sure that any importance is attached to this circumstance. The cases cited in the opinion, however, from Gardner *vs.* Thompson, 14 Johnson, 134, to G. W. Ry. Co. *vs.* Miller, 19 Mich., 305, are all cases of "mere personal torts" which die with the person and are not assignable at common law.

The plaintiff's cause of action was clearly of another character. It was a tort upon a bank, inevitably a depredation on the property of the bank. It could not have been an assault and battery nor criminal conversation.

141 The court bases its judgment in this case upon the weakness of the main action of the Disconto Gezellschaft *vs.* Terlinden, holding the garnishment an auxiliary proceeding. This

view certainly makes the whole case, from the original suit down, part of the record of which the court will take judicial notice. Hence, it knows from the record that the tort consisted, as stated in the original complaint, in obtaining a loan of M. 400,000 by false and fraudulent representations and on the security of false and fraudulent shares of stock. It is a cause of action which survives and is assignable.

Tyson *vs.* McGuiness, 25 Wis., 656.

If the record in the Supreme Court does not contain the original suit, the presumption must be in its favor; *i. e.*, that it rests upon the class of tort which is entitled to the highest consideration. Error must be affirmatively shown. If appellant would insist that the cause of action was not of this character, he should have made the original suit part of the record on his appeal. If, however, a doubt should be entertained on this point and be deemed material, the court would undoubtedly direct it to be cleared up in the court below, as it has by this very judgment done as to a point of similar character in favor of the appellant.

Plaintiff's reply to the answer of the intervenor alleges that Terlinden fraudulently procured about $100,000 from plaintiff and shortly thereafter absconded. (Case in Appeal No. 45, p. 11.)

IV.

If the court, by reason of the discretion of entertaining
142 jurisdiction of the original suit, can suspend the effect of the statutory garnishment of the defendant's property, we earnestly submit that this should only be done in favor of a claim of such cogency and merit that not to give it preference would be a disappointment of justice. The intervenor should not only be a resident of Wisconsin but his situation should be such as to give him a moral right to look to the property in question for payment.

Can this be said of the appellant here?

1. Where a debt is contracted to, and credit given by, a resident upon the faith of property regularly and for legitimate purposes in this state—as where it is employed in business or held as an investment here—a strong claim would arise in behalf of the domestic creditor for favorable consideration. When, however, a foreign absconder, in fraud of his foreign creditors who are in pursuit, hies to our shores in secrecy and disguise to hide both his person and property, we submit that the scales of justice incline strongly in favor of these foreign creditors, even as against a resident creditor if there be any, inasmuch as the latter's claim could not have accrued upon or been influenced by faith on account of the property in question. The property with which the debtor flees is, it is true, in a technical sense, his own. But the creditors whom he has defrauded have a strong equitable claim upon it.

2. But that is not our case. Here there were no domestic creditors. The intervenor knew when he accepted employment from defendant that the latter was charged with being an absconder and a fugitive
from justice. The very next day, before any service of
143 moment can have been rendered, he was apprised of the fact that large obligations were claimed against his client and

that all the property which the latter had brought into this state was levied upon under legal process from its courts. Was he warranted, was he morally justified, thereafter to render services to Terlinden on the credit of this property?

Terlinden himself certainly could not touch it. It was taken from his possession and control completely. That effect, we take it, cannot be denied the proceedings taken against him. If he had given an assignment to Mr. Umbreit or any other person of the moneys in the First National Bank it could not have been respected. How could he do indirectly what he could not do directly? How could he contract debts and make them payable out of these attached moneys when the attachments were unquestionably valid against him? If these funds were taken from his reach and control, how could he by any act of his give to third persons any better right to them than he himself had? Yet it is only by his subsequently contracted indebtedness that the intervenor obtains the rights adjudged to him.

To what consequences does this doctrine lead us? Suppose this defendant had not committed an extraditable offense and had remained in the city of Milwaukee? We assume that the effectiveness of the creditor's suits and attachments of his moneys as against him will not be denied. Yet if he can delay and drag out the litigation, which the necessity of taking testimony abroad and skill of counsel may facilitate, he can go on contracting debts of all kinds for all purposes, for board, lodging, amusement, expenses of litigation, buy goods for the purposes of business, all on credit, paying for
144 nothing—and all these debts being due to citizens of Wisconsin would have to be paid out of the moneys attached before the European creditors can have any benefit from their proceedings! The absconding debtor could thus indirectly, in spite of the attachments, get all the money for his own use.

It is not believed that the United States would be content to offer this scant measure of justice as its comity to citizens of friendly foreign nations who are *compelled to seek relief in its courts.*

Nor can the circumstance mentioned in the opinion of the court, that at the time of the attachment the intervenor had evidently been employed upon a contract *for continuous service,* make any difference. He was not bound to render such services unless he were compensated for them as they were rendred. If he continued them without receiving pay it was in effect a new contract from day to day.

The opinion says:

"Nor does it make any difference that the home creditor's claim may have accrued after that of the foreign creditor." But that does not reach the point. The true point is that the home creditor's claim accrued after the debtor's property had been taken from him by due authority of law and while it was held under legal process for satisfaction of the judgment which was demanded against him upon a claim then legally in suit.

We respectfully appeal to the Court to grant a re-hearing and give further consideration to that part of its judgment holding that this

case is to be governed by the situation at the time of the
145 rendition of final judgment and not according to the rights of parties as they were at the commencement of the action.

It is the general rule of jurisprudence that the judgment relates to the commencement of the action. Here there was no other claim against Terlinden when our suit was commenced except, we will say, a retainer and one day's service due to Mr. Umbreit. The plaintiff then by its attachment took possession provisionally of all the interest Terlinden had in the property, depriving him of every interest in and control over it. That provisional seizure became absolute with the rendition of judgment in favor of the plaintiff. Every right of the intervenor, (except the small one mentioned) if any exists, he must have derived directly or indirectly from Terlinden since the seizure.

It is said that the nature of the services rendered by the intervenor to the defendant does not appear. It is true that they are stated only in the most general terms. But what part of them consisted of is manifest. Mr. Umbreit was a practicing attorney and his services were rendered as such. It appears that Terlinden defended the present action through Mr. Umbreit as his attorney, and that although the action was commenced in August, 1901, judgment was not obtained until February, 1904. (Case in No. 45, p. 14.)

It is plainly inferable that a substantial part of the services for which the intervenor obtained judgment against Terlinden was for services in seeking to defend this suit. Is he entitled to compensation therefor out of the property attached? Does comity require it or admit of it?

146 We beg to submit a further proposition. If the intervenor's demand is to have preference over that of the plaintiff on the grounds on which the decision in this case proceeds, it should only be upon proof of its rightfulness as to merit and amount upon an issue tendered to which the plaintiff is a party.

The decision does not go upon the ground that the plaintiff's proceedings, attachment and garnishment, were void; but that by reason of special equities the intervenor has superior rights.

This superiority does not rest on his subsequent garnishment—that cannot be made prior. It must rest upon the quality, the merits of his claim.

The judgment which the intervenor has obtained, although in the form of the statute, is no better than an *ex parte* affidavit. The defendant was, to the intervenor's knowledge, a prisoner in Germany. The only notice given was publication of a summons in a Milwaukee paper. No copy of the summons and complaint was even mailed to the defendant. (Case No. 45, p. 15.) The only ground on which this can be omitted is that the "defendant's postoffice address *cannot be ascertained.*" Statutes, Sec. 2640.

But passing this, the defendant Terlinden, when intervenor's suit was brought against him, had not the slightest interest in the property sought to be reached. All his interest had passed to the plaintiff. The plaintiff was the only party adversely interested to the intervenor. It had a lien valid as to all the world, except the claim of the

intervenor upon all the property concerned for the payment of its
147 judgment. No power to hold this fact

An alien, too, is entitled to "due process of law" under the constitution of the United States.

In re Ah Fung, 3 Sawyer, 144.
Ah Kow *vs.* Nunan, 5 Sawyer, 562.
In re Ah Chung, 2 Fed. Rep., 733.

Whether he be or not as a matter of right this Court would not, where it proceeds as in this case upon a broad discretion, deny it to him.

Now the judgment against Terlinden was, as against this plaintiff, absolutely without process of law. It adjudicated nothing. The plaintiff was not a party; had no opportunity to defend against it.

The claim of the intervenor in the First National Bank case is based solely on the fact of his having obtained this judgment. (Case, p. 3.) In his answer in the Marine Bank case (p. 21) he does say that Terlinden is indebted to him in the sum of $7,500; but that is stated merely by way of inducement to the further allegations of the recovery of the judgment for that amount. The prayer claims the money wholly on the strength of the judgment. The decision of this court in the matter relating to the Marine Bank clearly recognizes that the claim of the intervenor has been in no way proven or established except by this judgment, if such it may be called, against Terlinden. The decision treats that judgment as final upon the plaintiff. Thus it is in effect held that by a judicial decree to which the plaintiff was not a party, it is deprived of $7,500 with interest and costs. It is not due process of law.

It is said in the opinion: "There is nothing in the record to
148 impeach the *bona fides* of that debt and service." But where was the plaintiff's opportunity to defend against its merits and amount?

It was set up against us as an amount *adjudicated*. The record shows the precise manner of its adjudication.

The court bases its action in this case as it were upon a broad discretion, a discretion given by reason of the fact that the plaintiff is an indulged suppliant rather than a rightful claimant for the redress of our remedial statutes. Is it not more consonant with this position that it grant to the intervenor what, upon enquiry, shall be found justly his due as against the plaintiff, than to award to him the amount of a judgment to which the latter was in no way a party?

These several questions are as weighty as they are new. The case involves a very important question in International relations. Its importance in what it may lead to cannot be over-estimated. We respectfully ask that before making it final the Court give it a reconsideration.

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149 STATE OF WISCONSIN:

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Argument of Appellant on Motion of Respondent for Rehearing.

Joseph B. Doe, Attorney for Appellant.

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CLARENCE KELLOGG,
Clerk, S. C.

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Argument of Appellant on Motion of Respondent for Rehearing.

I.

Respondent's brief starts out with the suggestion that the above cases involve "a delicate question of international law."

151 Respondent's argument begs the entire question.

These cases involve no "delicate question of international law" and no question of international law at all.

The proper administration of our own laws is all that is involved.

From the beginning to the end, counsel ignore the basic principle of the decision of this court, and say in their brief that this court "takes position upon a broad, general principle and makes an application of it, for which there is not claimed to be a precedent."

Truly, an extraordinary statement as to this decision.

This court has decided, as has every other court before which the question has arisen, that the courts of this state will first protect the citizens of this state and will not allow the property of a foreign debtor to be impounded and withdrawn from this state or appropriated by a foreign creditor until the domestic creditors have been paid.

More than a dozen authorities in support of this proposition are cited in appellant's brief (pages 7-9).

In the language of the decision in C., M. & St. P. Ry. Co. *vs.* Packing Co., 108 Ill., 317:

"It is the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied."

Doubtless, this court had in view the numerous precedents cited by appellant when it said, in the opinion objected to:

"The laws of the state are enacted primarily for the regu-
152 lation, benefit and protection of persons, rights and property within its jurisdiction. To hold that two foreigners may import bodily a cause of action and insist, as a matter of right, that the taxpayers, citizens and residents shall await the lagging steps of justice in the ante-room, while the court hears and decides the foreign controversy, seems, on the face of it, to be unreasonable, if not absurd."

Counsel say: "The theory on which the court has rested its decision was not mentioned in appellant's brief."

The principle upon which the decision was made was the proper administration of our laws when the interests of foreigners conflict with the interests of our own citizens.

The discussion of the nature of the doctrine of "Comity" and its extent, with the citation of numerous authorities extending over nearly ten pages of appellant's brief, seems to have made no impression upon counsel for respondent, while the decision of the court is in accord with such argument and the precedents there cited.

This court properly defines "comity" as "courtesy, a disposition to accommodate," and decides that a disposition to accommodate foreigners will not be exercised to the injury of our own citizens.

The whole argument of respondent's counsel ignores the vital principle of these cases, viz: that where a citizen of this state will be injured thereby, this court will not permit the property of a foreigner to be removed from this state or appropriated by a foreign creditor.

The whole argument of counsel is addressed to the propriety or necessity of exercising the principle of what counsel calls "comity
between nations," where no conflicting interests of our own
153 citizens occur. It ignores the real question here.

No reference is made in their brief to facts like those in the cases at bar.

"Comity" is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and *to the right of its own citizens.*

22 A. & E. Ency. Law, 2d Ed., 1319, and cases cited.
6 A. & E. Ency. Law, 2d Ed., 216, and cases cited.

The decision objected to distinctly asserts and protects the right of a foreigner to invoke the jurisdiction of our courts and holds that the plaintiff, a foreign creditor, is entitled to any balance of debtor's funds remaining after the claims of appellant, a domestic creditor, have been satisfied, so that the doctrine of comity of nations is recognized in this opinion in its broadest and fullest extent, and its limitation is correctly fixed at the point where its exercise would injuriously affect our own citizens.

Respondent's counsel entirely ignore this limitation.

If counsel's argument were sound, any foreign creditor who could manage to get an attachment, or even an equitable lien upon property in this state of a foreign debtor, or garnish its holder, before one of our own citizens could obtain such a lien, the property might be taken from the state to a foreign country and our citizens referred to foreign tribunals in a distant land for the enforcement of their rights.

154 No court has ever held that the doctrine of comity, or any other doctrine, requires any such hardship.

What difference does it make to appellant whether the controversy between foreigners is brought to our courts by choice or from necessity? For what purpose do we support the government? Why do we pay our taxes, if it be not that such government shall protect our interests as against foreigners, through its judicial, as well as its other branches?

Respondent's counsel has much to say about treaty obligations, a discussion entirely foreign to the subject under consideration.

This government has no treaty with the German Empire which could in any event have any bearing upon this question, but the principle involved is not a treaty obligation in any sense, nor within the rules for the construction of a treaty, and no treaty has ever been made requiring any government to favor foreigners at the expense of its own citizens.

On page 9, respondent's counsel, referring to certain attachment or garnishment cases, say:

"No question of non-residence or of foreigner has ever played a part in these cases."

Such an assertion indicates that the numerous citations in appellant's brief—to say nothing of those in the opinion of this court—have received little attention.

Respondent's counsel define the comity of nations as "international justice."

A better definition is "The judicial courtesy due to foreigners when the interests of our own citizens are not thereby injuriously affected."

155 In Bailey *vs.* South Carolina Ins. Co., 1 Nott & M., 543 (S. C.), Nott, J., says: "I understand comity to mean respect, or what between individuals would be called civility or politeness."

II.

Counsel argue that the statement of this court that plaintiff, while here nominally as a creditor, is really the agent of the foreign trustee in bankruptcy, is not correct.

In view of the confessed agreement by which the trustee consents that the plaintiff may maintain the action here, notwithstanding the prohibition in the German statute, in consideration that the avails, if any, shall be turned over to the trustee, it is thought no reply to this paragraph is needed.

III.

In the third paragraph, respondent's counsel travels outside the record for the purpose of informing the court of what plaintiff claims to be the nature of the tort committed by Terlinden.

We make no answer to such argument.

IV.

The fourth paragraph is devoted to arguing that, in order to be considered, the debt due Mr. Umbreit should have been contracted upon the credit of property of his debtor within this state.

What more likely than that a lawyer, upon being retained, should inquire as to client's ability to pay and should be fully
156 satisfied thereof on discovering that such client has large amounts to his credit in local banks?

Moreover, what creditor can have a more equitable claim upon property of his debtor than a lawyer, whose services are required to protect such property, as well as client's personal rights and interests?

V.

The fifth and last paragraph is an attack upon the merits of Mr. Umbreit's claim.

We submit that such attack is wholly unjustifiable and not creditable to those making it.

Counsel claim that they have had no opportunity to litigate the validity and equity of Mr. Umbreit's claim, and state "It was set up against us as an amount adjudicated."

What the purpose of such a statement can be, we do not determine. It is sufficient to point out the fact that the allegation of Mr. Umbreit's answer in the equity suit against the Marine National Bank and others is that Terlinden "is indebted to this defendant in the sum of $7,500.00, upon account, for services rendered by this defendant, etc." (Case, p. 21.)

The claim is not pleaded as a judgment at all, and as a matter of fact, at that time, the judgment in Mr. Umbreit's favor, relied upon, had not been obtained.

Then, if at all, was the time for respondent to attack the justice

of Mr. Umbreit's claim. By failing to do so it practically admitted on the record the justice and equity of his claim and his right to a judgment, and having done so, it can not now properly ask another opportunity to question it.

157 Counsel's statement that the questions involved in these cases are weighty, is correct, but that they are new is wholly incorrect, as the numerous cases cited by appellant clearly show.

The appellant asked this court to decide that, where the property of a foreigner was found in this state and a foreign creditor sought to appropriate it or remove it from this state, it appearing that a citizen of this state had a claim against such debtor which he was seeking to enforce against such property, while the courts of this state would fully recognize the doctrine of comity of nations, by which foreign laws are recognized and foreigners are permitted, through courtesy, to invoke the jurisdiction of our courts, when no citizen of this state is injured thereby, that the appropriation or removal of such property from the state, before the claim of our own citizen was adjudicated, and if valid, satisfied, would not be permitted; that when any property of a debtor could be found within the jurisdiction of our courts and held to satisfy the just claims of our citizens, domestic creditors would not be relegated to foreign countries to litigate their claims.

This court has so decided, and we submit that the decision is entirely correct.

Dated March 14, 1906.

JOSEPH B. DOE,
Appellant's Attorney.

158 Be it remembered, that at a term of the Supreme Court of the State of Wisconsin, began and held at the Capitol, in Madison, the seat of Government of said State, on the second Tuesday, to-wit, on the ninth day of January, A. D. 1906, on the thirty-second day of the term, to-wit: On the 17th day of April A. D. 1906. Present,

John B. Cassody, Chief Justice, John B. Winslow, R. D. Marshall, Joshua Eric Dodge, Robert G. Siebecker and James C. Kerwin, Justices of said Court, the following proceedings were had, *Inter Alia*, to-wit:

THE DISCONTO GESELLSCHAFT, Respondent,
vs.
GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK, Garnishee; AUGUSTUS C. UMBREIT, Intervenor and Appellant.

Appeal from Circuit Court, Milwaukee County, State of Wisconsin.

The Court being now fully advised of and concerning the motion of the said respondent for a rehearing herein,

It is now here ordered and adjudged, by this Court, that said motion be and the same is hereby denied, with twenty-five dollars costs and costs of motion.

STATE OF WISCONSIN, *Supreme Court:*

I, Clarence Kellogg, Clerk of the Supreme Court, of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the Court in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, this twenty-fifth day of May, A. D. 1906.

[SEAL.] CLARENCE KELLOGG,
Clerk of the Supreme Court of the State of Wis.

159 STATE OF WISCONSIN:

In Supreme Court.

THE DISCONTO GESELLSCHAFT, Respondent,
vs.
GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK, Garnishee, Defendant; AUGUSTUS C. UMBREIT, Intervenor and Appellant.

SAME, Respondent,
vs.
AUGUSTUS C. UMBREIT, Impleaded with GERHARD TERLINDEN ET AL., Appellant.

WINSLOW, *J.:*

Upon motion for rehearing in these cases our attention is called to Section I of the treaty concluded between the United States and the Kingdom of Prussia in 1828, which reads as follows:

"There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective states shall mutually have liberty to enter the ports, places and rivers of the territories of each party wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs; and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing."

Attention is also called to a provision in the treaty of 1799, between the same parties, as follows:

"Each party shall endeavor by all the means in their power to protect and defend all vessels and *other effects* belonging to the citizens or subjects of the other which shall be *within the extent*
160 *of their jurisdiction by sea or by land.*"

We have been unable to see that either of these treaty provisions has any bearing on the questions in controversy here.

By the COURT: Motions denied.

Filed May 8th, 1906.

CLARENCE KELLOGG,
Clerk of Supreme Court, Wis.

161 STATE OF WISCONSIN, *Supreme Court, ss:*

I, Clarence Kellogg, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original motions for rehearing, notices of motions for rehearing, orders of the Court denying motions for rehearing, and opinion of the Court by Justice Winslow denying motions for rehearing, on file in my office in the above entitled causes, and that it is a correct transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, this twenty-fifth day of May, A. D. 1906.

[SEAL.] CLARENCE KELLOGG,
Clerk of the Supreme Court of the State of Wisconsin.

Filed May 26th, 1906.

A. A. WIEBER, *Clerk.*

[Endorsed:] Further return. Filed May 20, 1906. A. A. Wieber, Clerk.

162 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,
vs.
GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, Garnishee; AUGUSTUS C. UMBREIT, Intervenor.

Please take notice that the record and remittitur from the Supreme Court in the above entitled action was filed in the office of the clerk of said court for Milwaukee County on the 20th day of April, 1906.

Dated April 20th, 1906.

JOSEPH B. DOE,
Attorney for Intervenor, Augustus C. Umbreit.

To Winkler, Flanders, Smith, Bottum & Fawsett, Attorneys for plaintiff.

163 [Endorsed:] Circuit Court, Milwaukee County. The Disconto Gesellschaft, Plaintiff, *vs.* Gerhard Terlinden, Defendant, First National Bank of Milwaukee, Garnishee, Augustus C. Umbreit, Intervenor. Notice of filing of Remittitur. Joseph B. Doe, 314-318 Wells Building, Milwaukee. Attorney for Intervenor. Received Apr. 21 1906. Winkler, Flanders, Smith, Bottum & Fawsett. Copy. Filed May 3, 1906 A. A. Wieber Clerk.

164 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,
vs.
GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, Garnishee; AUGUSTUS C. UMBREIT, Intervenor.

To Messrs. Winkler, Flanders, Smith, Bottum & Fawsett, attorneys for plaintiff; Miller, Noyes & Miller, attorneys for garnishee, and Augustus C. Umbreit, attorney for defendant.

GENTLEMEN: You will please take notice that on the 12th day of May, 1906, at the opening of the court on that day, or as soon thereafter as counsel can be heard, in Branch No. 1 of the Circuit Court for said Milwaukee County, Hon. Lawrence W. Halsey, Circuit Judge, presiding, at the Court House, in the city of Milwaukee, in said county, Augustus C. Umbreit, the above named intervenor, will, upon the record and papers on file, including the mandate of the Supreme Court in the above entitled action, move said Circuit Court for an order directing the vacating and setting aside of the judgment of said Circuit Court heretofore entered in the above entitled action and dated December 27, 1904, and directing the clerk of said court to cancel and vacate all entries of said judgment in the judgment docket of said court, and directing the clerk of said court to pay over to the said intervening defendant, or his attorney, all moneys paid into court in the above entitled action by said First National Bank, the garnishee above named, together with all interest which may have accrued upon said moneys, and directing said clerk to enter judgment in favor of said Augustus C. Umbreit, the intervening defendant above named, and against The Disconto Gesellschaft, the plaintiff above named, for the costs and disbursements of said intervening defendant in said action, pursuant to the mandate of said Supreme Court in said action.

Dated May 2, 1906.

JOSEPH B. DOE,
Attorney for Intervening Defendant.

165 [Endorsed:] Copy. Circuit Court, Milwaukee County. The Disconto Gesellschaft, Plaintiff, *vs.* Gerhard Terlinden, Defendant, First National Bank, of Milwaukee, Garnishee, Augustus C. Umbreit, Intervenor. Notice of Motion. Joseph B. Doe, 314-318 Wells Building, Milwaukee, Attorney for Intervenor. Received May 2, 1906. Winkler, Flanders, Smith, Bottum & Fawsett. Filed May 3, 1906. A. A. Wieber, Clerk.

166 Filed May 15, 1906. A. A. Wieber, Clerk.

Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,

vs.

GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, Garnishee; AUGUSTUS C. UMBREIT, Intervenor.

In obedience to the mandate of the Supreme Court of the State of Wisconsin in the above entitled action, heretofore made and on file in this court, and after hearing Joseph B. Doe, of counsel for Augustus C. Umbreit, intervening defendant, and Winkler, Flanders, Smith, Bottum & Fawsett, attorneys for the above named plaintiff, and the court being fully advised;

On motion of Joseph B. Doe, attorney for Augustus C. Umbreit, intervening defendant in said action, it is hereby

Ordered that the judgment heretofore rendered and entered in this court in the above entitled action and dated December 27, 1904, by which it was adjudged and decreed that the plaintiff, The Disconto Gesellschaft, have and recover of the garnishee, First National Bank, of Milwaukee, the sum of six thousand nine hundred and sixty nine dollars and forty seven cents ($6969.47), and that the answer of the intervening defendant, Augustus C. Umbreit, be dismissed upon the merits, and that the plaintiff, The Disconto Gesellschaft, have and recover of said intervening defendant, Augustus C. Umbreit, its costs and disbursements taxed at the sum of thirty six dollars and fifty seven cents ($36.57), be and the same is hereby in all respects vacated, set aside and held for naught and the clerk of this court is hereby ordered to cancel and vacate any entry of said judgment in the judgment docket of this court; and on like motion it is further hereby

167 Ordered that the clerk of this court be and he is hereby directed to deliver and pay over to said intervening defendant, Augustus C. Umbreit, or to his said attorney, said sum of six thousand nine hundred and sixty nine dollars and forty seven cents ($6969.47), paid into court by said First National Bank, of Milwaukee, the garnishee above named, pursuant to the order of this court heretofore made and entered, dated December 27, 1904, together with all interest or other increment which said clerk shall receive upon or by reason of such payment; and on like motion, it is further

Ordered that said clerk be and he is hereby directed to enter judgment in favor of Augustus C. Umbreit, the above named intervening defendant, and against The Disconto Gesellschaft, the above named plaintiff, for the costs and disbursements of said intervening defendant, to be taxed by said clerk.

Dated May 15th, 1906.

By the Court,

LAWRENCE W. HALSEY,
Circuit Judge.

168 Circuit Court, Milwaukee County.

THE DISCONTO GESELLSCHAFT, Plaintiff,

vs.

GERHARD TERLINDEN, Defendant; FIRST NATIONAL BANK OF MILWAUKEE, Garnishee; AUGUSTUS C. UMBREIT, Intervenor.

At the regular April term for 1906 of said Circuit Court, in Branch Number One, Hon. Lawrence W. Halsey, Circuit Judge, presiding, and on the 15th day of May, 1906.

The above entitled action having been tried at the October term, 1904, before Hon. Lawrence W. Halsey, Circuit Judge, presiding, without a jury, and the court having duly made and filed its findings of fact and conclusions of law, and judgment having been duly rendered and entered in favor of the above named plaintiff, wherein and whereby it was adjudged and decreed that the plaintiff, The Disconto Gesellschaft, have and recover of the garnishee, First National Bank, of Milwaukee, the sum of six thousand nine hundred and sixty nine dollars and forty seven cents ($6969.47); that the answer of the intervening defendant, Augustus C. Umbreit, be dismissed upon the merits, and that said plaintiff recover of said Augustus C. Umbreit its costs and disbursements, taxed at thirty six dollars and fifty seven cents ($36.57), and Augustus C. Umbreit, said intervening defendant, having duly appealed from said judgment, and the whole thereof, to the Supreme Court, and said Supreme Court having, on the 30th day of January, 1906, wholly reversed said judgment of said Circuit Court, and a motion for a rehearing made by the above named plaintiff having been denied by said Supreme Court on the 17th day of April, 1906, and the record in said action having been duly remitted from said Supreme Court to said Circuit Court upon such reversal, with directions by said Supreme Court that said Circuit Court for Milwaukee County render judgment for the intervening defendant, Augustus C. Um-
169 breit, and that he recover the sum garnishe-d in said action, with costs, and due notice of the filing of said record in this court having been given, as appears by the proofs on file, and due notice of motion for this judgment having been given and proof of due service of such notice having been made and filed, and the court having duly ordered judgment herein in favor of said intervening defendant:

Now, on motion of Joseph B. Doe, attorney for said intervening defendant, Augustus C. Umbreit, it is hereby

Adjudged, pursuant to such mandate and the order of this court heretofore made and entered, that Augustus C. Umbreit, the above named intervening defendant, do have of The Disconto Gesellschaft, the plaintiff above named, the costs and disbursements of this action, heretofore taxed and allowed at the sum of Fifty eight & 85/100 dollars.

Dated May 17th, 1906.

By the Court,

A. A. WIEBER, *Clerk*,
By CHAS. SCHERER,
Deputy Clerk.

170 [Endorsed:] Circuit Court, Milwaukee County. The Disconto Gesellschaft, Plaintiff, *vs.* Gerhard Terlinden, Defendant, First National Bank of Milwaukee, Garnishee, Augustus C. Umbreit, Intervenor. Order for Judgment and Judgment. Joseph B. Doe 314-318 Wells Building, Milwaukee, Attorney for intervenor. Filed and docketed May 17, 1906, at 10:30 A. M. A. A. Wieber, Clerk.

171 STATE OF WISCONSIN:

Circuit Court for Milwaukee County.

I, A. A. Wieber the Clerk of the Circuit Court of the state of Wisconsin for the County of Milwaukee, Branch No. 1, and as such the legal custodian of its records and seal, do hereby certify that the foregoing and attached papers are the original writ of error, Petition for writ of error and assignment of errors and allowance of writ of error, Supercedeas Bond and Citation with admission of service by defendant in error and copies of all the records, files and proceedings, and judgments including the opinion and mandates of the Supreme Court of the State of Wisconsin in the action referred to in and upon which said writ of error was issued. That I have compared such copies with the originals now of record in my office and that such copies are true and correct copies of such originals and the whole thereof and that such originals and such copies are herewith returned to the Supreme Court of the United States in pursuance of such writ of error and constitute the schedules referred to in the return on said writ.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Circuit Court at my Office in Milwaukee, Wisconsin. This 25th day of June, One Thousand Nine Hundred and Six.

[Seal Circuit Court, Milwaukee Co., Wisconsin.]

A. A. WIEBER,
Clerk of the Circuit Court of the State of Wisconsin for the County of Milwaukee, Branch No. 1.

[Endorsed:] Circuit Court, Milwaukee County. The Disconto Gesellschaft, Plaintiff, *vs.* Gerhard Terlinden, Defendant, First National Bank of Milwaukee, Garnishee, Augustus C. Umbreit, Intervenor.

Endorsed on cover: File No. 20,305. Wisconsin, Milwaukee county, circuit court, branch No. 1. Term No. 340. The Disconto Gesellschaft, plaintiff in error, *vs.* Augustus C. Umbreit. Filed July 11th, 1906. File No. 20,305.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

No. 63.

THE DISCONTO GESELLSCHAFT, Plaintiff in Error,

vs.

AUGUSTUS G. UMBREIT.

BRIEF FOR PLAINTIFF IN ERROR.

F. C. Winkler,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 63.

THE DISCONTO GESELLSCHAFT, PLAINTIFF IN ERROR,

vs.

AUGUSTUS G. UMBREIT.

BRIEF FOR PLAINTIFF IN ERROR.

It may be desirable, in the way of explaining the record, to point out the technical framework of the proceeding, so that one not familiar with its forms will readily understand it.

The action against the *defendant* is commenced by service of a summons.

Statutes, sections 2629, 2630, 2631.

Section 2752 provides the proceeding of garnishment.

Section 2753 requires an affidavit on behalf of the plaintiff.

It provides, among other things:

"Any number of garnishees may be embraced in the same affidavit and summons hereinafter provided for; but if a joint liability be claimed against any it shall be so stated in such affidavit; * * * otherwise the several garnishees shall be deemed severally proceeded against."

Section 2754 prescribes the form of the garnishee summons. The affidavit and garnishee summons will be found on pages 8 and 9 of the record; certificate of service on pages 6 and 7.

Four garnishees are named. No mention is made of any joint liability; hence each of the four is proceeded against severally.

Each garnishee is required to answer for himself (sections 2759, 2760). The plaintiff may take issue on the answer, "In which case the issue shall stand for trial as a civil action, in which the affidavit on the part of the plaintiff shall be deemed the complaint and the garnishee's affidavit the answer thereto" (section 2763).

Now, it will be observed that the First National Bank made answer by the affidavit of its cashier (Record, pages 11-12), and that the plaintiff took issue thereon (Record, page 13). This made a civil action (collateral to the main action) against the First National Bank as garnishee.

In *this* action the defendant in error filed the amended answer, which sets out the claim he makes in this case, and it is on the record which this action presents that the judgment under review was rendered.

We are induced to call attention to this by the attempt of defendant in error to bring in what is said to appear of record in the case against the Marine National Bank. (See Brief of Defendant in Error, page 17.)

The case against the Marine National Bank, though covering the same ground to a certain extent, involved other questions and had its own record.

The two actions were not "consolidated"; they were tried together, but there was a separate judgment in each, and from each there was a separate appeal from the Circuit Court to the Supreme Court of Wisconsin.

It is true Mr. Justice Winslow says (Record, page 50), "The two actions were consolidated for the purposes of trial, and from a judgment in favor of the plaintiff in each case the defendant Umbreit appeals."

It is clear that the word "consolidated" was here not used in its technical sense. There was no consolidation such as makes the record in each case part of the record in the other. The learned judge evidently means nothing more than the fact that, for convenience and the saving of time, the two actions were tried together, each, however, being treated and considered on its own record and merits.

The answer in the Marine National Bank case does not appear in the present record; the statement made in regard to it at the top of page 17 in brief of defendant in error, is grossly incorrect.

The Supreme Court of Wisconsin was clearly of the opinion that the defendant's claim rested purely on his judgment obtained by default on substituted service. The opinion says:

"We are only informed that Umbreit obtained judgment by default upon substituted service of the summons, and the question has occurred to us (though not suggested in the briefs) whether such a judgment constitutes any proof that any sum was owing from Terlinden to Umbreit; in other words, is the judgment itself proof of personal liability, especially when the parties are litigating their rights in a court of equity? The validity and justice of the plaintiff's judgment in the main action cannot be questioned, because it was rendered after personal service of the summons and is unappealed from; but the defendant Umbreit has no such judgment, and is not found as matter of fact to have had any claim against Terlinden, except his judgment obtained by default on substituted service" (Record, pages 58, 59).

We beg also to point out that the claims of defendant in error rest on his *amended answer*, printed on pages 33–35 of Record, and not on the answer found at page 23, which was abandoned, as appears in his affidavit on page 32.

Respectfully submitted,

F. C. WINKLER,
Counsel for Plaintiff in Error.

No. 68.

SUPREME COURT OF THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

No. 340.

THE DISCONTO GESELLSCHAFT,
Plaintiff in Error.

vs.

AUGUSTUS C. UMBREIT,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The record in this case contains much that is immaterial to the question before this Court. This statement will point out all that is essential, referring to the pages of the printed record.

The Disconto Gesellschaft, a banking corporation of Berlin, Germany, commenced an action in the Circuit Court of the State of Wisconsin, for Milwaukee County, on the 17th of August, 1901, against Gerhard Terlinden, defendant, and the First National Bank of Milwaukee (among others) as garnishee. (pp. 8, 9, 12, 40.) No question is made as to the sufficiency of the affidavit of garnishment and proper service of papers according to Wisconsin Statutes.

The defendant Terlinden appeared in the action by Augustus C. Umbreit (the defendant in error) as his attorney. (p. 9.) The First National Bank appeared and admitted an indebtedness of $6,420. (pp. 11, 12.)

On the 24th of September, 1903, the defendant in error made application for, and on the 27th of October, 1903, received permission to intervene in said action, in his own behalf. (pp. 14-22.)

Defendant in error thereupon served and filed an answer as intervener which was subsequently abandoned. (p. 32.) An amended answer was then interposed, making the following allegations:

First. That he was a citizen and resident of the State of Wisconsin.

Second. That on the 21st of March, 1904, he commenced an action in the Circuit Court of Milwaukee County against Gerhard Terlinden.

Third. That in said action on the 10th of June, 1904, judgment was rendered in his favor for the sum of $7,500.

Fourth. That at the time of the commencement of such action, garnishment proceedings were taken therein, among others against the First National Bank of Milwaukee as garnishee.

Fifth. That said garnishee had made answer, of which a copy is annexed.

Sixth. That the plaintiff in the present action (The Disconto Gesellschaft) was at the time of the commencement thereof and still is an alien, organized and existing solely under and by virtue of the laws of Germany.

Seventh. That on the 27th of July, 1901, proceedings in bankruptcy were had in the courts of Germany whereby Gerhard Terlinden was declared a bankrupt, in which proceedings one Paul Hecking was appointed trustee in bankruptcy.

Eighth. That in such bankruptcy proceedings and before the commencement of the present action the plaintiff therein (Disconto Gesellschaft) filed its claim against Terlinden with said trustee in bankruptcy and submitted to the jurisdiction of said Courts of the German Empire and participated in the proceedings in said matter therein and still was a party to said bankruptcy proceedings.

Ninth. That the claim so filed by said plaintiff in bankruptcy proceedings was the same claim on which the present suit is founded.

Tenth. That the German Bankruptcy Code, in Paragraph 14, provides as follows:

> "While bankruptcy proceedings are pending individual creditors cannot seize and have compulsory process against either the property belonging to the bankrupt estate or other property belonging to the bankrupt debtor."

Thereupon said intervenor prayed judgment, declaring the lien created by the service of garnishee-process in his action to be prior and superior to the lien created by the garnishee-process in the present action, and directing that said judgment of said intervening defendant be first satisfied out of the property in the hands of the First National Bank of Milwaukee. (pp. 33-35.)

The plaintiff *replied* to said answer, admitting the *first, sixth* and *seventh* paragraphs thereof and denying all other allegations *except* as specifically admitted. As to the action commenced and judgment obtained by the intervenor against Terlinden, the reply alleged, that no process was served on the defendant therein; that such defendant did not appear therein, nor had any knowledge thereof; that the judgment was rendered by default and without jurisdiction. The *reply* further averred that the defendant, Gerhard Terlinden, having

fraudulently procured from said plaintiff the sum of about $100,000, did shortly thereafter, to-wit: in the month of July, 1901, abscond from the Empire of Germany, of which he was a resident and inhabitant, and concealed himself under an assumed name in the State of Wisconsin, where he was on the 16th of August, 1901, arrested and thereafter extradited under extradition proceedings as a fugitive from justice; that said defendant brought with him to said State of Wisconsin moneys from said German Empire of large amount. That thereupon on the 17th of August, 1901, the plaintiff commenced an action in this Court against said defendant and by process of attachment and garnishment seized and levied upon all the moneys and property of said defendant so brought into the State of Wisconsin; that said Terlinden appeared in said action and answered the plaintiff's complaint therein and that thereafter such proceedings were had in said action that judgment was given in favor of this plaintiff and against said Terlinden on the 19th of February, 1904, in the sum of $94,145.11, damages and costs; that said judgment was duly docketed in the office of the Clerk of the Circuit Court of Milwaukee County on the 26th of February, 1904; that the plaintiff had collected upon said judgment the sum of $9,402.39, leaving due $85,371.49, with interest from March 26, 1904; that after the commencement of said action and before judgment therein the plaintiff filed its claim for the damages by it sustained by the fraudulent acts of the defendant with the trustee in bankruptcy in Germany. The reply also averred that Paragraph 14 of the German Bankruptcy Code did not apply to creditors of the bankrupt seizing property belonging to the debtor outside of the jurisdiction of the German Bankruptcy Court and that said 14th paragraph had no force or validity outside of the jurisdiction of said Court. (pp. 37-39.)

Upon the issues thus presented, trial was had in the Circuit Court of Milwaukee County on the second day of November, 1904, which resulted in the following decision:

FINDINGS OF FACT.

I.

That on the 17th of August the plaintiff commenced an action in this Court against Gerhard Terlinden for recovery of damages by the tort of the defendant committed in the month of May, 1901; that said defendant appearing in said action by Augustus C. Umbreit, his attorney on August 19, 1901, answered the plaintiff's complaint; that thereafter such proceedings were had in said action that judgment was duly given on February 9, 1904, in favor of said plaintiff, Disconto Gesellschaft, and against said defendant Terlinden for $94,145.11, damages and costs; that $85,371.49, with interest

from March 26, 1904, is now due thereon; that at the time of the commencement of said action process in garnishment was served on the above named garnishee, First National Bank of Milwaukee as garnishee of the defendant Terlinden.

II.

That on August 9, 1901, and August 14, 1901, a person giving his name as Theodore Grafe deposited in said First National Bank of Milwaukee the equivalent in German money of $6,420; that said sum remained in said bank and with accrued interest amounted to $6,969.47.

III.

That the defendant Terlinden and said Grafe were the same person.

IV.

That on March 21, 1904, the intervenor, Augustus C. Umbreit, commenced an action in this Court against the defendant Terlinden for recovery *for services rendered between August 16, 1901, and February 1st, 1903;* that no personal service of the summons therein was had on said defendant; that said summons was served by publication only and without the mailing of a copy of the summons and complaint to said defendant; that said defendant did not appear therein; that on June 11, 1904, judgment was given in said action by default in favor of said Umbreit and against said Defendant Terlinden for $7,500, no part of which has been paid; that at the time of the commencement of said action, process of garnishment was served, to-wit, on March 22, 1904, on the First National Bank of Milwaukee.

V.

That the defendant Terlinden at all the times set forth in Finding No. 1, was and still is a resident of Germany; that about July 11, 1901, he absconded from Germany and came to the State of Wisconsin and assumed the name of Theodore Grafe; that on August 16, 1901, he was apprehended as a fugitive from justice upon extradition proceedings duly instituted against him and was thereupon extradited to Germany.

VI.

That the above named defendant, The Disconto Gesellschaft, at all the times set forth in Finding No. 1, was, ever since has been, and still is a foreign corporation, to-wit, of Germany, and during all

of said time had its principal place of business in Berlin, Germany, and that the intervenor, Augustus C. Umbreit, during all of said times was and still is a resident of Wisconsin.

III.

That on or about the 27th day of July, 1901, proceedings in bankruptcy were instituted in Germany against said defendant Terlinden and Paul Hecking appointed trustee of his estate in such proceedings on said date; that thereafter and on or after August 21, 1901, the above named plaintiff, The Disconto Gesellschaft, was appointed a member of a committee of creditors of the defendant Terlinden's personal estate and accepted such appointment; and that the above named plaintiff, The Disconto Gesellschaft, presented its claim to said trustee in bankruptcy proceedings; that said claim had not been allowed by said trustee in January, 1902, and there is no evidence that it has since been allowed; that nothing has been paid upon said claim; that said claim so presented and filed is the same claim upon which action was brought by the plaintiff in this Court and judgment given as set forth in Finding No. 1; that said action was instituted by said plaintiff, The Disconto Gesellschaft, through the German Consul in Chicago; and that steps so taken by the plaintiff, The Disconto Gesellschaft, had the consent and approval of Dr. Paul Hecking as trustee in bankruptcy so appointed in the bankruptcy proceedings in Germany and that after the commencement of the same the plaintiff, The Disconto Gesellschaft, agreed with said trustee that the moneys it should recover in said action should form part of said estate in bankruptcy and be handed over to the trustee; that among other provisions the German Bankruptcy Act contained the following:

"Section 14. Pending the bankruptcy proceedings neither the assets nor any other property of the bankrupt are subject to attachment or execution in favor of individual creditors."

CONCLUSIONS OF LAW.

I.

That the garnishee, First National Bank of Milwaukee, at the time of the service of the plaintiff's garnishee process, to-wit, August 17, 1901, was indebted to the defendant Terlinden in a sum amounting with interest to $6,969.47.

II.

That the plaintiff, The Disconto Gesellschaft, acquired a valid levy and lien upon said indebtedness of said garnishee, First National Bank of Milwaukee.

III.

That the defendant Umbreit acquired a valid levy and lien upon said indebtedness subject to the levy and lien acquired thereon by the plaintiff. (pp. 40-42.)

Upon this finding judgment was rendered in favor of the plaintiff for the money in the hands of the First National Bank, dismissing the claim of the intervenor. (pp. 44, 45.)

The Bank thereupon paid the money in its hands into Court and was dismissed from the action. (pp. 45, 46.)

The intervenor, A. C. Umbreit, appealed to the Supreme Court of Wisconsin. (p. 47.)

The Supreme Court reversed the judgment on the 30th day of January, 1906, and directed judgment to be entered in the Court below for the defendant Umbreit, that he recover the sum garnished with costs. (p. 49.)

The opinion of the majority of the Supreme Court is found in the printed record at pages 50 to 61.

The opinion admits that the plaintiff under the statutes of Wisconsin obtained a lien on the funds in the Bank to satisfy any judgment it might recover against Terlinden dating from August 17, 1901.

Also that the intervenor's lien accrued at a long subsequent date, and upon a claim the great bulk of which at least accrued subsequently to August 17, 1901. The Court denied the plaintiff's claim to the moneys attached, solely on the ground that the plaintiff is a foreigner and resident of Germany. A motion for rehearing was made by the respondent and duly submitted on printed arguments March 19, 1906. (pp. 61, 62, 63.)

Printed arguments on this motion, filed on behalf of the respondent, The Disconto Gesellschaft, are set out in the record (pp. 63 to 74), printed arguments in reply on behalf of the appellant Umbreit on pages 75 to 79.

The respondent, The Disconto Gesellschaft, in its argument made the claim that the denial to it of the fruits of its lien by reason of its being a foreigner was in violation of rights under treaties between the United States and Germany. (pp. 66 et seq.) It also made the claim that by awarding the moneys garnished to the intervenor it was deprived of its rights therein without due process of law, in violation of the constitution of the United States. (pp. 73, 74.)

The Court overruled the motion for rehearing, filing an opinion in express terms denying the claim made by the respondent under the treaties, and by necessary implication denying its claim made under the constitution of the United States. (pp. 79, 80.)

Thereafter remittitur was filed in the Circuit Court of Milwaukee County and final judgment entered there on May 17, 1906, pursuant

to the direction of the Supreme Court, to the effect that the money paid into Court be paid over to Augustus C. Umbreit. (p. 84.)

The present writ of error is brought to review this judgment and the decision of the Supreme Court on which it is founded.

ASSIGNMENT OF ERRORS.

First. Error was committed in that judgment was given in favor of the intervenor and against said plaintiff awarding to said intervenor the sum of six thousand nine hundred sixty nine and 47/100 dollars ($6,969.47) and interest accrued thereon on deposit in this Court, on the ground that although said plaintiff had acquired a lien thereon by garnishment long prior to the accrual of the claim on the part of said intervenor, said plaintiff was not entitled to such lien as against said intervenor by reason of said plaintiff being a resident and subject of the Kingdom of Prussia, and said intervenor a resident and citizen of the State of Wisconsin, whereas, by virtue of certain treaties between the United States and the Kingdom of Prussia, viz.: a treaty concluded in 1828, and a treaty concluded in 1799, said plaintiff was and is entitled to the full protection of the laws of the State of Wisconsin in the matter of its suit and proceedings against Gerhard Terlinden equally with a resident of Wisconsin, as is claimed in this action and appears of record; said judgment having been so rendered upon the final decision and direction of the Supreme Court of the State of Wisconsin.

Second. Error was committed in awarding to said intervenor the said sum of money on deposit in Court in payment of an alleged judgment obtained by said intervenor against said Gerhard Terlinden, as constituting a lien upon said fund, which said judgment was obtained and rendered without jurisdiction, without notice to or service of process upon said Gerhard Terlinden, and without notice to or process served upon the plaintiff herein, although such plaintiff at the time of the commencement of his action by said intervenor had a valid lien on said fund by virtue of garnishment and of a judgment against said Terlinden theretofore duly obtained for more than the full amount of said fund, said alleged judgment depriving this plaintiff of its property without due process of law, in violation of the Constitution of the United States, which was duly claimed by said plaintiff and appears of record, such awarding of said sum being by and pursuant to the final decision and direction of the Supreme Court of Wisconsin. (Record, p. 4.)

ARGUMENT.

I.

The Federal questions were brought before the Supreme Court of the state and claim made under them in the argument for rehearing.

The motion was denied and opinion rendered expressly overruling the claim based on the treaties and by necessary implication, also the claim based on the Constitution of the United States. (p. 80.)

The rulings upon them are therefore subject to review.

McKay vs. Kalyton, 27 Sup. Ct. Rep., 346.
Leigh vs. Green, 193 U. S., 79.

The Federal question on both points is presented by the undisputed facts of the record. The case could not be determined without deciding these questions. They were both specifically claimed in the argument on motion for rehearing. The merits of the case were reviewed by the Supreme Court of the State, and finally decided after this argument. An opinion was rendered. It expressly passed upon one of these questions, and by necessary implication the other also. Both questions are therefore subject to review.

Columbia Water Power Co. vs. Columbia Street Railway Co., 172 U. S., 465.

Under the statutes and rules of practice of the State of Wisconsin, the motion for a rehearing is in point of fact a rehearing. The motion is one of statutory right.

Section 3071 (Statutes of 1898) among other things provides:

"The clerk of the Supreme Court shall remit to such Court (the Court below) the papers transmitted to the Supreme Court on the appeal or writ of error, together with the judgment or decision of the Supreme Court thereon, within sixty days after the same shall have been made, unless the Supreme Court, on application of either of the parties, shall direct them to be retained for the purpose of enabling such party to move for a rehearing. In case such motion for a rehearing is denied, the papers shall be transmitted within twenty days from such denial."

It is held that during the time that the "papers" are retained in the Supreme Court in pursuance of this statute, the Supreme Court retains full jurisdiction over the case, although the term of Court at which the judgment is rendered may have expired.

Krall vs. Lull, 46 Wis., 643.
Patten Paper Co., vs. Green Bay M. C. Co., 93 Wis., 283, 291.

The rules regulating a rehearing are as follows:

Rule XX. The clerk of this Court shall retain all appeal papers until the thirtieth day after the decision or other final disposition of the appeal in this Court. And every motion for a rehearing shall be filed before the thirtieth day after the decision. If no motion for a rehearing be then made, the clerk shall remit the appeal papers to the Court below according to law. If a motion for

a rehearing be filed within the time above limited the clerk shall enter an order to retain the appeal papers until the disposition of the motion. No distinction shall be made under this rule between days in term and days in vacation.

Such motions shall not be argued orally, but shall be submitted on printed arguments, of which eight copies shall be furnished to the clerk. The party moving shall, at least ten days before submitting such arguments to the Court, serve a copy thereof on the opposing counsel, with a notice of the time when the same will be filed and submitted. And such opposing counsel may, on the day mentioned, file and submit his answer thereto.

If the arguments in support of the motion are not served and submitted within twenty days after the filing of the motion, the motion shall be deemed waived.

This rule shall apply to all causes brought to this Court within its appellate jurisdiction, whether by appeal or by writ." (R. S. 1898, Sec. 2407.)

It will be observed that the rule requires printed arguments, of which a copy is to be served on the opposing counsel with a notice of the time when it will be filed and submitted, and that such opposing counsel may on the day mentioned file and submit his answer thereto. A full number of copies is to be furnished the clerk of the Court. These printed arguments, thus required by rule which has the force of statute, become part of the record of the case and must be considered and passed upon before ultimate decision.

Even after the motion is denied the "papers" are under the statute retained in the Supreme Court for twenty days and the cause remains under the jurisdiction of that Court during such time.

II.

The plaintiff's suit was brought under the statutes of Wisconsin. The defendant was in Wisconsin. The property attached had been brought by him and placed on deposit in the State of Wisconsin. No Court in the world could exercise jurisdiction either over his person or over his property except the Courts of Wisconsin. No statute debars an alien from seeking justice in Wisconsin Courts where the protection of his rights require it. Its statutes are broad.

"Section 2752: Any creditor shall be entitled to proceed by garnishment in the Circuit Court of the proper county against any person (except a municipal corporation) who shall be indebted to or have any property whatever, real or personal, in his possession, or under his control belonging to the creditor's debtor in the cases upon the conditions and in the manner prescribed in this chapter. The term 'plaintiff' is used in this chapter to embrace every judgment creditor, and the term 'defendant,' a judgment debtor."

Sections 2753 to 2767 prescribe the details of the proceeding. The next section reads:

"LIABILITY OF GARNISHEE—Section 2768: From the time of the service of the summons upon the garnishee he shall stand liable to the plaintiff to the amount of the property, moneys, credits and effects in his possession, or under his control belonging to the defendant or in which he shall be interested, to the extent of his right or interest therein and to all debts due or to become due to the defendant except such as may be by law exempt from execution."

Regular proceedings were had under these provisions on behalf of the plaintiff in which service was had both upon the garnishee and upon the defendant himself, on the 17th of August, 1901. Judgment was rendered against the defendant for over $90,000 February 19th, 1904.

The plaintiff is denied the benefit of the proceedings and of its judgment because being a foreigner it has no *rights* in the State of Wisconsin except such as "comity," which is "good nature," will accord it. The intervenor's lien, by reason of which the plaintiff was denied the fruits of his attachment, did not attach until March 21, 1904, a month after the plaintiff had obtained its judgment and upon a cause of action which accrued subsequent to the plaintiff's garnishment of which the intervenor had full knowledge.

Is this justice? Is it consistent with the duty which the Government of the United States and the Empire of Germany owe respectively to the citizens of the other under "a system of entire freedom of navigation and a *perfect reciprocity based upon principals of equity* clearly beneficial to both countries" to which they stand committed by treaty?

We accept the position of the Supreme Court of Wisconsin that the right of the plaintiff to pursue its absconding debtor into this country and to invoke the latter's remedial processes against him rests upon the comity of nations. It is, however, the comity of the SOVEREIGNTY, not of the Court.

Wharton Conflict of Laws, Section 1a.

What is this comity? Is it a thing that can be given or withheld at will? This will not be claimed. Rather, let us say, it is a sacred duty resting on considerations of mutual confidence and reciprocal justice. Civilization demands its exercise where justice requires it. It cannot be denied, we submit, in whole or in part, except on clear, clean principles of justice.

The opinion refers to the rights accorded to "resident alien friends" and to "alien friends whether resident or non-resident," who have property here or contracts with residents. Their rights too rest on comity. Yet it seems to be conceded that in protecting them the

Courts will accord the full benefit of the law of the land. Then it is added:

"The plaintiff, however, is within neither of these principles. It is a non-resident. It has no property of any kind within the state. It has made no contract within the state or with any resident of the state. It has brought action against another non-resident alien temporarily within the state to redress a wrong committed without the state, and it asks the Courts of this state not only to give it judgment for the wrong but also to lend the aid of its process to impound property within the state and satisfy such judgment therefrom."

All of the above is true, but it is not all the truth. *The plaintiff does not bring a foreign controversy to our Courts by choice.*

We beg to submit that no stronger case appealing to our Courts for extending to the plaintiff all the rights which our statutes give to litigants, with the benefit of incidental advantages which accrue from their processes, than the one at bar can be presented.

Here is a confessed absconding debtor and fugitive from justice. He flees to our shores seeking to hide his person from his government and his property from his defrauded creditors under an assumed name.

International treaties compel the extradition of his person. The property with which he has absconded he places under the jurisdiction of American law. No other law can reach it. He has no creditors but foreigners. Are they helpless? They have no redress except as they may find it under the laws of the land to which their debtor has fled, in which he has placed it for hiding.

And do not the inexorable demands of International justice require that that country shall throw open its Courts of justice to these creditors, with all processes devised by its statutes for the impounding of a debtor's property and the collection of debts? Can the comity of nations, which must rest on moral principles, be satisfied with anything less? Is this a mere act of grace or "good nature," or is it not rather a duty which a civilized country owes to civilization? It may rest on comity but comity imposes duties. This is recognized in the definition quoted from Mr. Webster in the opinion of the Court:

"It is in general terms that there are between nations at peace with one another, rights both national and individual resulting from the comity or courtesy due from one friendly nation to another. Among these is the right to sue in their Courts respectively."

The duty to do as you would be done by obtains between nations as it does between individuals. The most sacred of duties rest on moral grounds, not on compulsion.

Where, therefore, the situation is such that a foreigner is, without his fault, compelled to resort to our laws for justice, should it not be

awarded to him on the same enlightened principles which are enacted for our own citizens and yielded to resident aliens? Is not this the practice of enlightened nations?

In Story on Conflict of Laws, Section 542, it is said that "there are nations" which refuse to take cognizance of controversies between foreigners; but it is added: "In England and America, on the other hand, suits are maintainable and are constantly maintained between foreigners where either of them is within the territory of the state in which the suit is brought."

The same, of course, is true of Germany. The German law is liberal. It opens its Courts to the foreigner, giving him resort to all its legal remedies, subject only to security for costs, and of this he is relieved if the laws of his own country do not require it of foreigners. He may also sue in *forma pauperis* if the laws of his own country give that privilege to Germans. Foreign creditors stand on the same footing with home creditors in insolvency proceedings except that this may be denied them by the *Bundesrat* in retaliation.

Lexikon des Deutschen Rechts, by Joseph Kuerschner; sub nomen "Auslaender."
Civilprozessordnung, Sections 53, 102, 106.
Konkursordnung, Section 5.
See also *Entscheidungen des Reichgerichts in Civilsachen.* Vol. 14, p. 409.

Wharton's Conflict of Laws (3d Ed.) says:

"Sec. 705. In Germany, England and the United States the Courts as a general thing make no distinction, so far as jurisdiction is concerned, between cases in which parties are foreigners and those in which they are subjects."

So constant and uniform is the practice of lending their judicial remedies and processes by civilized nations to foreigners who are driven to them for the protection of rights that it is not generally in express words provided for in treaties. It goes *sua sponte.* But it is sometimes done. There was the treaty of the United States with the little German Kingdom of Hanover in 1840. Article I. relates to the rights of the respective citizens in the foreign state. It provides, among other things, the following:

"They shall have free access to the tribunals of justice in their litigious affairs *on the same terms which are granted by the law and usage of the country to native citizens and subjects,* for which purpose they may employ in defense of their rights such advocates, attorneys and other agents as they may judge proper."

This provision is repeated in Art. X. of the Treaty of 1846.

Public Treaties, (Govt. Printing Office, 1875), pp. 388-394.

It was in 1847 extended to other German principalities. Ibidem, pp. 470, 578.

Can it be for a moment supposed that the United States by this treaty granted to the subjects of the Kingdom of Hanover rights which did not belong to subjects of other European nations with whom we had treaty relations of the closest friendship? Or can it be supposed that with the absorption of Hanover by the Kingdom of Prussia these rights of Hanoverian subjects ceased to exist? Is it not more consonant with reason to conclude that the rights here expressly given are nothing more than what was intended by the treaties of amity and friendship between the United States and Prussia? In 1828 the latter kingdom contracted a treaty with the United States which in its preamble recited "the relations of good understanding which had so happily subsisted" between their respective states, and the desire of "consolidating commercial intercourse between them," and the conviction "that this object could not better be accomplished than by adopting a system of entire freedom of navigation, and a *perfect reciprocity*, based upon *principles of equity* equally beneficial to both countries." Article I. is as follows:

> "There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective states shall mutually have liberty to enter the ports, places and rivers of the territories of each party wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs; and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing." Ibid., p. 656.

This treaty must have a liberal interpretation. It was designed to extend and liberalize the "good understanding" between two enlightened nations and place the rights of their respective citizens on firmer ground—certainly not to narrow them.

It gave to the foreigner not only the right to reside but to "sojourn" in the land of the other "in order to attend to his affairs." Whenever he has "affairs" which can only be attended to in that country he has a right so to "sojourn." And "to that effect," i. e., "in order to attend to his affairs," he is entitled to the same security and protection as natives of the country enjoy in which he resides (or sojourns).

This is the manifest purpose and fair reading of the treaty.

Now, when Gerhard Terlinden committed his frauds on his fellow citizens in Germany and fled to and hid in the United States, carrying with him his ill-gotten spoils, his creditors in Germany had "affairs" in the country to which he had fled and where he was seeking immunity for himself and his spoils. They had the right to go there and sojourn there for the purpose of attending to their affair.

If an individual creditor had come over, taken rooms in a Milwaukee hotel, and taken the same proceedings which the present plaintiff did, he would have been within the very letter of the treaty. This, of course, was impossible in the case of a corporation. But physical presence cannot be an essential to the treaty right.

The important stipulation, the cardinal virtue of the "bill of rights" mutually given, was to secure to the foreigner the conduct of his "affairs," and to that end to give him *the protection* enjoyed by a native.

This may not, and would not extend to affairs, which he could as well do at home. But we submit that it does *imperatively* apply to affairs which circumstances have brought to American soil, so that the only possible means of giving them attention must be exerted in America and with the aid of American law. In such case when he comes, either in person or by agent, he becomes a sojourner here for the purpose of attending to his affairs.

The Supreme Court of the United States in *Tucker vs. Alexandroff*, 183 U. S., 424, on p. 437, said:

> "We think, then, that the rights of the parties must be determined by the treaty, but that this particular convention being operative upon both powers and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose. Taylor on International Law, Sec. 383. As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence. It is said by Chancellor Kent in his Commentaries (Vol. 1, p. 174): 'Treaties of every kind are to receive a fair and liberal interpretation according to the intention of the contracting parties, and are to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts.' "

The fundamental error of the Supreme Court of Wisconsin seems to us to consist in treating the plaintiff's case as a foreign controversy which could have been litigated and adjudicated in the country of the party's citizenship.

Thus it cites the case of *Eingartner vs. Illinois Steel Company*, 94 Wis., 70. Record, page 53. It was there held that a non-resident of the state was entitled to sue a corporation of his own state, which

also had a plant in the State of Wisconsin, in the latter, upon a cause of action accrueing in his own state as a matter of strict right. It is pointed out that this was only by reason of the constitutional provision "that citizens of each state shall be entitled to all the privileges and immunities of citizens of another state." The cases are not analogous. In that case it was mere caprice on the part of the plaintiff to sue in Wisconsin instead of in Illinois. Nor do any of the cases cited (Record, p. 54,) support the decision under review.

Gardner vs. Thomas, 14 Johnson, 134, was a case where a British seaman, bound on a continuous voyage back to his own country, while the ship *touched* at New York brought an action in Justice's Court for an alleged assault committed by his master on the high seas. It was held that the jurisdiction should not be entertained. "Mariners might so annoy the master of a vessel as to break up the voyage and thus produce great distress and ruin to the owners."

Jurisdiction was here refused in consideration of the interests of foreign commerce. Both plaintiff and defendant being on their return to their own country were left to litigate their differences there.

In *Johnson vs. Dalton,* 1 Cowen, 543, jurisdiction for an assault and battery on the high seas was entertained.

In *DeWitt vs. Buchanan,* 54 Barb., 31, "an ordinary case of assault and battery committed in Canada, both parties still residing there," Mr. Justice James struck the principle for which we contend in these words:

> "Foreigners should not be invited to bring their matters here for litigation. But if a foreigner flee to this country he may be pursued and prosecuted here." (p. 33.)

Olson vs. Schierenberg, 3 Daly, 100, was an action by a cabin boy against a master and mate of a foreign ship for cruel treatment during a voyage. It was ruled for the defendants on the merits. It was also held that where the seaman had bound himself by his shipping articles not to bring any dispute or quarrel with the master or his substitute before any Court but that of his own country, foreign tribunals would give effect to such stipulation unless the voyage *as respects the plaintiff* was brought to an end at the foreign port without wrong on his part.

In *Burdick vs. Freeman,* 120 N. Y., 421, and *G. W. Ry. Co. vs. Miller,* 19 Mich., 305, the situation of the parties was the same as in *Eingartner vs. Ill. Steel Co., supra.*

None of these cases outrages justice, by denying it to a party who cannot obtain it elsewhere.

It may be urged that it is not *unjust* simply to postpone the foreign creditor to a resident citizen. This garment, however, does not fit the present case. The plaintiff and the intervenor do not, either on the merits of their claims or by reason of their proceedings, stand on equal footing. The opinion says:

"Nor does it make any difference that the home creditor's claim may have accrued after that of the foreign creditor."

That rather hides than reveals the facts of the case. The true point is that the home creditor's claim accrued *after the debtor's property had been taken into the custody of the law*, for the purpose of satisfying the foreigner's demand.

It had been taken from Terlinden's control. He certainly could not touch it. Could he assign it? It will scarcely be claimed. How could he do indirectly what he could not do directly? How could he contract debts and make them payable out of these attached moneys, when the attachments were unquestionably valid against him? If these funds were taken from his reach and control, how could he by any act of his own give to third persons any better right than he had himself? Yet it is only by his subsequently contracted indebtedness that the intervenor obtains the rights adjudged him. To what consequences does this doctrine lead us? Suppose this defendant had not committed an extraditable offense and had remained in the City of Milwaukee. If he can delay and drag out the litigation which the necessity of taking testimony abroad and skill of counsel may facilitate, he can go on contracting debts of all kinds, for all purposes, and all these debts being due to citizens of Wisconsin will have to be paid out of the moneys attached, before the European creditors can have any benefit from their proceedings! The absconding debtor could thus, indirectly, in spite of the attachments, get all the money for his own use.

It is not believed that the United States would be content to offer this scant measure of justice as its comity to citizens of friendly foreign nations who are compelled to seek relief in its Courts.

The intervenor knew when he accepted employment from the defendant that the latter was charged with being an absconder and a fugitive from justice. The very next day, before any service of moment can have been rendered, he was apprised of the fact that large obligations were claimed against his client, and that all the property which the latter had brought into the State of Wisconsin was levied upon under legal process. Was he warranted, was he morally justified thereafter to render services to Terlinden on the credit of this property?

In concluding the argument on this branch of the case, we beg to refer the Court to the dissenting opinion of Chief Justice Cassoday, 127 Wis., 672.

III.

But it is said:

"But there are other facts which have a material bearing. The foreign creditor is here nominally in his character as a creditor but really as the mere agent of the foreign trustee in bankruptcy

who could not himself come here and assert any right to the property. The creditor has agreed to hand over to the trustee for general distribution all that he may recover in this action. Thus it is proposed by the aid of our Courts to set at naught the policy of our own law to the effect that a foreign trustee or receiver in involuntary bankruptcy proceedings obtains no title to the debtor's property, within this state. This is certainly imposing upon good nature, and comity is after all simply good nature." (Record, p. 58.)

This is not set out as an independent ground of judgment. It is mentioned rather as an aggravation of the plaintiff's other disability. The judgment of the case rests on that.

But let us examine it. The statement is founded solely on the finding of the trial Court that our "action was instituted through the German consul in Chicago, and that the steps taken by the plaintiff had the consent and approval of Dr. Paul Hecking as trustee in bankruptcy so appointed in the bankruptcy proceedings in Germany, and that after the commencement of the same the plaintiff, The Disconto Gesellschaft, agreed with said trustee that the moneys he had recovered in said action should form part of said estate in bankruptcy and be handed over to said trustee." (R. p. 42.)

Is it true that the plaintiff sues as the agent of a foreign trustee in bankruptcy?

That trustee has and claims no rights to the bankrupt's property in Wisconsin. This can hardly be said to be so by reason of a *policy* of Wisconsin law. It is for the sole reason that the transfer of the bankrupt's property to the trustee is by operation of law only, and the foreign law does not operate on property beyond its jurisdiction.

Segnitz vs. G. C. Banking & Trust Co., 117 Wis., 171, 176.

The fact that the property in question was not transferred to the trustee left its legal title in the debtor. The plaintiff being a creditor brought suit on his own claim in his own right. That the trustee approved cannot lessen the plaintiff's right. The trustee had no title to these assets. Why should he not approve a creditor's bringing suit to recover them?

Nor does the circumstance that the creditor after suit commenced promised to turn over the proceeds he should recover to the trustee for distribution impair his rights as a creditor. That the plaintiff had an honest claim is conclusively established by the judgment recovered against the defendant after personal service of process. This is admitted in the opinion in these words:

"The validity and justice of the plaintiff's judgment in the main action cannot be questioned, because it was rendered after personal service of the summons and is unappealed from; but the defendant Umbreit has no such judgment and is not found as a

matter of fact to have had any claim against Terlinden except his judgment obtained by default on substituted service." (R., p. 59.)

That being so, how can the plaintiff's right of action be affected by what he intended or promised to do with the proceeds?

The State of Wisconsin has no policy or prejudice against a distribution among creditors generally. On the contrary, it will enforce such a course where it is directed by a foreign *voluntary* assignment. It is only when the foreign assignment is the mere act of foreign law which has no extraterritorial force that it does not give it effect.

Segnitz vs. Banking & Trust Co., supra.

The course of the plaintiff in no way "sets at naught" the rule of our law that the trustee in bankruptcy does not obtain title to property in Wisconsin by reason of the proceedings in Germany.

It will be observed also that no claim is made on this score in the intervenor's answer. (Record, pp. 33-35.)

IV.

The decision of the Supreme Court of Wisconsin deprives the plaintiff of its property rights without due process of law, in violation of the Constitution of the United States.

The decision does not go so far as to hold the plaintiff's proceedings void. The Court had undoubted jurisdiction. *Peabody vs. Hamilton*, 106 Mass., 217. Its proceedings are conceded to be effective except as to what is adjudicated to be the superior claim or equity of the intervenor. That superior claim consists of the latter's suit commenced March 21st, 1904, and the judgment rendered therein June 10th, 1904. His answer does not disclose or assert any indebtedness except this judgment. (Record, page 33.) As the Supreme Court of Wisconsin in its opinion says:

> "But the defendant Umbreit has no such judgment (founded on personal service of process) and is not found, as matter of fact, to have any claim against Terlinden except his judgment obtained by default on substituted service." (Record, page 59.)

The judgment which the intervenor obtained, although in the form of the statute is in point of fact no better than an ex parte affidavit. The defendant was to the intervenor's knowledge a prisoner in Germany. The only notice given was by publication of the summons in a Milwaukee paper. No copy of the summons and complaint was ever mailed to the defendant.

Section 2640, Statutes of Wisconsin, provides that when service by publication is ordered, the order shall require "that on or before the day of the first publication the plaintiff deposit in a specified postoffice a copy of the summons, together with a copy of the complaint, or of the notice of the object of the action, as the case may require, securely enclosed in an envelope, the postage duly paid, addressed to the defendant to be therein named, or a direction *that such deposit*

may be omitted because the defendant's address cannot be ascertained."

But passing this, the defendant Terlinden, when the intervenor's suit was commenced against him, had not the slightest interest in the property sought to be reached. All his interest had passed to the plaintiff. The plaintiff was the only party adversely interested to the intervenor. It had an adjudicated lien good against all the world (except the claim of the intervenor).

An alien, too, is entitled to "due process of law under the Constitution of the United States."

In re Ah Fung, 3 Sawyer, 144.
Ah Kow vs. Nunan, 5 Sawyer, 562.
In re Ah Chung, 2 Fed. Rep., 733.

Now the judgment against Terlinden was, as against this plaintiff, absolutely without process of law. It adjudicated nothing. The plaintiff was not a party therein, nor was notified and had no opportunity to defend against it.

The claim of the intervenor is based in his answer, as we have seen, solely on the fact of his having obtained this judgment. (Record, page 33.) The prayer is that *this judgment be adjudicated of superior virtue to the claims of the plaintiff.* And this was the decision of the Supreme Court of Wisconsin, although it clearly recognized the weakness of the judgment. The decision, however, treats it as final upon the plaintiff, adjudicates it to he paid out of the plaintiff's moneys. Thus it is held that by a judicial proceeding to which the plaintiff was not a party, it is deprived of $7,500 with interest and costs.

This we submit is clearly not due process of law.

Respectfully submitted,

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WINKLER, FLANDERS, BOTTUM & FAWSETT,
Attorneys.

SUPREME COURT OF THE UNITED STATES.

October Term. 1906.

No. 63.

THE DISCONTO GESELLSCHAFT,

Plaintiff in Error,

vs.

AUGUSTUS C. UMBREIT,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The statement of the case made in the brief of plaintiff in error is controverted by defendant in error to some extent. It does not fairly state all the facts before the Supreme Court of Wisconsin and upon which the decision of that court was made. We therefore here submit the facts in the case, as stated by the Wisconsin Supreme Court.

(References in this brief to pages refer to the printed transcript of record, unless otherwise specified.)

It is important to remember that two actions were consolidated and argued as one. They were entitled in the Wisconsin Supreme Court, as follows (p. 50.)

"The Disconto Gesellschaft,	Respondent,
vs.	
Gerhard Terlinden,	Defendant,
First National Bank,	Garnishee Defendant, and
Augustus C. Umbreit,	Intervenor and Appellant";
and	
"Same Respondent,	
vs.	
Augustus C. Umbreit,	
Impleaded with	
Gerhard Terlinden, et al,	Appellant."

Following the title, the Wisconsin Supreme Court makes the following, statement (p. 50:)

"The two actions above named, the first by way of garnishment, and the second by way of a creditor's bill, to reach non-leviable assets, were consolidated for the purposes of the trial, and from the judgment in favor of plaintiff in each action the defendant, Umbreit, appeals. The facts in the case were not in dispute and were substantially as follows: The plaintiff is a banking corporation of the German Empire, having its principal banking house at Berlin; Gerhard Terlinden, the defendant in the main action, was and is a subject of the German Empire; in July, 1901, Terlinden absconded from Germany to this country and was arrested at Milwaukee, August 16, 1901, as a fugitive from justice in extradition proceedings, which proceedings afterwards resulted in his being extradited to Germany.

In May 1901, Terlinden had committed torts in Germany, by which the plaintiff bank had sustained damages, amounting to nearly $100,000.00, and on August 17, 1901, the plaintiff commenced an action by the personal service of a summons upon Terlinden in the Milwaukee circuit court, to recover its damages for said torts, and at the same time garnished the First National Bank and the Marine National Bank, of said city. The First National Bank answered, admitting the previous deposit by Terlinden of sums aggregating $6420.00. The Marine National Bank answered, admitting the previous deposit by him of $5000.00, for which it had issued to him a negotiable certificate of deposit, in the usual form, which had not been returned.

February 19, 1904, plaintiff recovered a judgment in the main action against Terlinden for $94105.11.

The appellant, Umbreit, is and was at all times named a citizen and resident of Wisconsin and rendered services for Terlinden, beginning August 16, 1901, and ending February 1, 1903, and on March 21, 1904, commenced an action against Terlinden to recover for such services in which action he obtained service by publication only. At the time of the commencement of such action, he also garnished the defendants, First National Bank and the Marine Nation-

al Bank. Umbreit obtained a judgment in his main action by default, on June 11, 1904, for $7500.00 damages; thereupon, he intervened in plaintiff's garnishee action against the First National Bank and claimed that his lien by garnishment was superior to that of the plaintiff.

April 1, 1904, plaintiff brought an action in equity, in the nature of a creditor's bill, against Terlinden,, The Marine National Bank, John C. Ames and Umbreit,, the object of the action being to aid its lien by garnishment against the Marine Bank, and it demanded judgment that the $5000.00 certificate of deposit, which was in the possession of the defendant Ames, not endorsed, be subject to the lien of its judgment against Terlinden and that the claims of Umbreit and the other defendants be cut off. In this action, a temporary injunction, preventing the transfer or payment of the certificate of deposit, was issued and served upon the defendants. The defendant Ames surrendered the certificate into court and disclaimed title thereto; the defendant, Umbreit, answered, setting up his own judgment and garnishment and claiming that his lien thereby was superior to that of the plaintiff.

On or about July 27, 1901, proceedings in bankruptcy were instituted in Germany, against Terlinden, and one Hecking was appointed trustee of the estate; on or about August 20, 1901, plaintiff presented its claim to said trustee in bankruptcy, being the same claim upon which the main action was brought. The main action was commenced with the approval of the trustee Hecking, and after its commencement, plaintiff agreed with Hecking that all moneys it should recover in the action should form part of the estate in bankruptcy and be handed over to the trustee Hecking.

It appears that the German bankruptcy act contains the following provision: 'Sec. 14: Pending the bankruptcy proceeding, neither the assets nor any other property of the bankrupt are subject to attachment or execution in favor of individual creditors'.

The garnishee action against the First National Bank and the bill in equity against the Marine National Bank were thereupón consolidated and tried together, and the court, upon the above

facts, awarded the money in both banks to the plaintiff." (127 Wis. 654-656.)

In the foregoing statement there is one mistake, viz: The court states that in the suit in equity, brought by the plaintiff against Umbreit and others, to reach the fund on deposit in the Marine National Bank, the defendant in error, Umbreit, "answered, setting up his own judgment and garnishment". What Umbreit did set up in his answer was a claim, on account, for services, etc. (p. 78). This equity suit was begun April 1, 1904, and the defendant in error did not obtain his judgment against Terlinden until June 11, 1904. (p. 51.)

Counsel for plaintiff in error state, on page 6 of their brief: "The opinion admits that plaintiff, under the statutes of Wisconsin, obtained a lien on the funds in the bank to satisfy any judgment it might recover against Terlinden, dating from August 17, 1901."

We challenge the statement. What the Wisconsin supreme court said, in substance and effect was that if the plaintiff in error was entitled to maintain his action against Terlinden and entitled to the statutory, auxiliary remedies, such as garnishment and attachment *as a matter of right,* he would have obtained a prior lien by his garnishment (p. 57); that is to say: If the garnishee action brought by the German Bank could be maintained in our courts *as a matter of right,* to the injury and loss of our citizens, then the lien of the plaintiff in error would have been prior and superior to that of the defendant in error.

Counsel for plaintiff in error also state (p. 6) that the Wisconsin supreme court "denied plaintiff's claim to the moneys attached *solely on the ground* that the plaintiff is a foreigner and resident of Germany."

A perusal of the opinion will show that the decision of the court was not solely on that ground, but upon the ground that both the corporation plaintiff and the defendant in the main action were non-resident aliens, attempting to litigate a cause of action arising in a foreign country, the plaintiff endeavoring to seize and remove from the jurisdiction of our courts the property of

the defendant, to the obvious injury and damage of one of our citizens. (pp. 57, 58).

There are but two assignments of error:

1st. That the decision of the Wisconsin supreme court violates certain provisions of the treaties of 1799 and 1828 between the United States and the Kingdom of Prussia.

2nd. That the decision of the Wisconsin Supreme court violates the fourteenth amendment to the Federal Constitution by depriving the plaintiff of its property, without due process of law.

ARGUMENT.

I.

The first argument of counsel for plaintiff in error to which we desire to reply is that the decision of the Wisconsin supreme court is unjust and not consistent with the duty which the government of the United States owes to the Empire of Germany under "a system of entire freedom of navigation and perfect reciprocity based upon principles of equity, clearly beneficial to both countries." (Brief p. 10.)

The quotation is taken from the preamble of the "Treaty of Commerce and Navigation" between the United States and the Kingdom of Prussia, concluded May 1, 1828, and we may say that, except in the first assignment of error, counsel nowhere refer to the treaty of 1799, perhaps for the reason that it expired by limitation nearly one hundred years ago.

The treaty quoted from has reference to nothing except commerce and navigation and the matters referred to in the treaty do not cover this case.

Nothing can be found in the treaty of 1828, or any other treaty with Prussia, indicating that this government has ever consented, or ever will consent, to allow a foreign corporation to

come into this country and remove from the jurisdiction of our courts properly belonging to a non-resident alien—in spite of the fact that a citizen of this country, having a valid claim against such alien, seeks in our courts to establish his claim and collect it out of the same property—thereby compelling our own citizen to seek his remedy in a foreign jurisdiction.

As said by the Wisconsin supreme court: "It is confidently believed that no court in such case has ever allowed or should allow a foreigner to seize and carry away property within the jurisdiction, when a resident creditor stands also at the bar, with his judgment and his provisional lien, and thus force such resident creditor to go to a foreign country to collect his debt. If such action be not prejudicial to the rights and interests of our citizens, it is difficult to see what action would be prejudicial. Nor does it make any difference that the home creditor's claim may have accrued after that of the foreign creditor. The question is not to be determined by the priority of time any more than by priority of garnishment, but by the situation at the time when the court is called upon to finally decide which creditor shall receive its aid. So, if the case were devoid of any other facts, comity would require that the interests of the home creditor be protected." (pp. 57,58.)

Counsel for plaintiff in error discuss at some length the doctrine of comity, but in their brief here, as in their brief on the motion for a re-hearing, entirely ignore that essential element of the doctrine of comity found in every definition, viz: that non-resident aliens will never be permitted to invoke the aid of our laws *to the injury of our citizens* and ignore the fact that the very foundation of the decision of the Wisconsin Supreme Court is the refusal to permit plaintiff to remove Terlinden's property from Wisconsin to the injury of a Wisconsin citizen.

It seems to us that, strictly speaking, the doctrine of comity, as defined by this court, has little application to the present case.

"Comity" is a recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and con-

venience and to the ***rights of its own citizens*** or of other persons who are under the protection of its laws.

Hilton vs Guyot, 159 *U. S.* 113.

The definition above quoted is adopted in 22 A. & E. Ency. of Law, 2nd Ed., 1319, and numerous cases there cited.

The law of comity is not a law of absolute obligation and its principles can never be invoked in aid of the enforcement of foreign laws, if such enforcement would contravene the settled policy or positive law of the state of the forum.

7 Current Law 679, and cases cited.

The settled policy of Wisconsin was announced in an early case (Gilman vs. Ketcham, 84 Wis. 60), in the following language quoted by the Wisconsin supreme court in the case at bar: "Our own citizens, in a proper case, would, no doubt, be protected against the effect of such extra territorial act and adjudication, if injurious to their interests or in conflict with the laws or public policy of Wisconsin and effect would not be given to it at the expense of injustice to our own citizens." (p. 56).

Again, says the Wisconsin court in the case at bar, quoting from Finney vs. Guy, 106 Wis. 256: "This court recognizes fully the importance of interstate comity and uniformly freely gives effect to it as regards the laws of sister states when it will not seriously violate the policy of our own laws or rights of our own citizens. * * * A liberal course in the enforcement of the laws of other states in proper cases should be the rule, but the paramount duty of our judicial system is to safeguard our own state policy and prevent injustice to our own people within reasonable limits," and the court cites the following additional cases in which this policy is approved:

Hughes vs Hunner, 91 *Wis.* 120.
Parker vs. Stoughton Mill Co., 91 *Wis.* 180.

Wyman vs. Kimberly-Clark Co., 93 *Wis.* 559.

But if this case does come within the doctrine of comity, no case can be found in which any court of this country ever recognized the claim made by plaintiff in error that a non-resident corporation should be permitted to remove property of a non-resident alien debtor from this country, to the injury of a citizen of this country seeking to satisfy a valid claim out of the same property

The doctrine contended for here and approved by the Wisconsin supreme court is well stated in

C. M. & St. P. Ry. Co. vs. Packing Co., 108 *Ill.* 317.

as follows: "It is the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied."

And again in

Woodward vs. Brooks, 128 *Ill.* 222,

the court said: "It is contrary to the policy of our laws to allow the property or fund of a non-resident debtor to be withdrawn from this state before his creditors, residing here, have been paid, and thus compel them to seek redress in a foreign jurisdiction."

The propositions relied upon as the basis of the decision of the Wisconsin supreme court and the authorities sustaining them are the following:

(a) Domestic creditors will be protected to the extent of not allowing the property or funds of a non-resident debtor to be withdrawn from the state before domestic creditors have been paid. Every country will first protect its own citizens.

Woodward vs. Brooks, supra.
Railway Co. vs. Packing Co., supra.
Catlin vs. Silver Plate Co., 123 *Ind.* 477.

Chafey vs. Fourth Nat. Bank, 71 *Me.* 514, 524.
Bagby vs. Railway Co., 86 *Pa. St.* 291.
Lycoming Fire Ins. Co. vs. Wright, 55 *Vt.* 526.
Thurston vs Rosenfelt, 42 *Mo.* 474.
Willitts vs Waite, 25 *N. Y.* 577.

(b) Citizens and residents of the country where insolvency proceedings have been instituted are bound by such proceedings and cannot pursue the property of the insolvent debtor in another country.

Cole vs. Cunningham, 133 *U. S.* 107.
Linville vs. Hadden, 88 *Md.* 594.
Chafey vs. Fourth Nat. Bank, supra.
Einer vs. Beste, 32 *Mo.* 240.
Long vs. Girdwood, 150 *Pa. St.* 413.
Bacon vs. Horne, 123 *Pa. St.* 452.

(c) A creditor, by proving his claim in bankruptcy or any insolvency proceedings, submits to the jurisdiction of the court in which the proceeding is pending and cannot pursue his remedy elsewhere.

Clay vs. Smith, 3 *Peters* 411.
Cooke vs. Coyle, 113 *Mass.* 252.
Ormsby vs. Dearborn, 116 *Mass.* 386.
Batchelder vs. Batchelder, 77 *N. H.* 31.
Wilson vs. Capuro, 41 *Cal.* 545.
Wood vs. Hazen, 10 *Hun.* 362.

(d) Where both parties, plaintiff and defendant, are residents of a foreign state, the plaintiff cannot come into our country and obtain an advantage by our law which he could not obtain by his own.

If he seeks to nullify the law of his own state and asks our

court to aid him in so doing, he cannot have such assistance, if for no other reason than that it is forbidden by public policy and the comity which exists between states and nations, which comity will always be enforced when it does not conflict with the rights of domestic citizens.

Bacon vs. Horne, supra.
In Re Waite, 99 N. Y. 433.
Bagby vs. Railway Co., supra.

(e) Citizens of a foreign state or country will not be aided by the courts of this country to obtain, by garnishment, a preference of their claim against a foreign debtor, in disregard of proceedings in their own country for the sequestration of the debtor's estate and the appointment of a trustee thereof in bankruptcy.

Long vs. Girdwood, supra.

(f) It is the uniform rule and doctrine of all courts that the principles of comity do not require that courts confer powers upon a foreign receiver or trustee in bankruptcy or permit him to bring and maintain actions in this state that interfere with and impair the rights of domestic creditors.

Humphreys vs. Hopkins, 81 Cal. 551.
Ward vs. Pac. Mutual Life Ins Co., 135 Cal. 235.
Hunt vs. Columbian Ins. Co., 55 Me. 290.
Pierce vs. O'Brien, 129 Mass. 314.
Rogers vs. Riley, 80 Fed. 759.
Catlin vs. Wilcox Silver Plate Co., 123 Ind. 477.

It is submitted that not a single one of these propositions is controverted in the brief of plaintiff in error.

Counsel say: "The plaintiff does not bring a foreign controversy to our courts by choice" and "He has no creditors but foreigners. Are they helpless?" (Brief p. 11.)

As we have seen, citizens of a foreign country will not be aided by the courts of this country to obtain a preference against a foreign debtor, in disregard of proceedings in their own country, and that it is the uniform rule and doctrine of all courts that the principles of comity do not require that a foreign receiver or trustee in bankruptcy be permitted to maintain actions in this country that interfere with the rights of domestic creditors.

The German bankruptcy code provides: "Sec. 14. Pending the bankruptcy proceeding, neither the assets nor any other property of the bankrupt are subject to attachment or execution in favor of individual creditors." (p 51.)

Bankruptcy proceedings were instituted in Germany against Terlinden July 27, 1901, and Paul Hecking appointed trustee. Plaintiff in error was appointed a member of a committee of creditors and accepted such appointment. It presented its claim to the trustee in bankruptcy, the identical claim which it is still pressing here. The action in Wisconsin was instituted by the plaintiff in error through the German consul in Chicago and such steps had the consent of the German trustee in bankruptcy. After the commencement of such action, plaintiff in error agreed with said trustee that any money it should recover in said action should form part of said estate in bankruptcy and be handed over to the trustee. (p. 51.)

Thus, it will be seen that far from being forced into our courts, plaintiff in error is asking our courts to permit it to do, under our laws, what the laws of its own country forbid, viz: to secure a preference over other creditors of Terlinden, who filed their claims in the bankruptcy proceedings in Germany, or to do what our laws forbid, i. e., to secure such fund, as agent of the foreign trustee in bankruptcy, by pretending that the action is brought in the name of the plaintiff for its sole benefit, thus attempting to defeat the German laws on one hand or to defeat the Wisconsin laws on the other, and this court is asked to endorse such proceedings, although thereby the honest claim of a life long resident of this country, seeking to enforce his rights under its laws, will be absolutely defeated.

As stated in the opinion of the Wisconsin Supreme Court: "At this very time (when plaintiff's garnishee summons was served) Terlinden was indebted to Mr. Umbreit, a citizen of our own state, in some amount, and evidently upon a contract for continuous service. There is nothing in the record to impeach the *bona fides* of that debt or service. Before plaintiff obtained any judgment on its claim, Umbreit's claim had become large." (p. 57).

Many of the contentions in the brief of plaintiff in error, under the subject of "comity" are not disputed, but in the entire argument, counsel ignore the fact that in this case the interests of a domestic creditor are involved.

Neither "comity" nor justice requires that a foreign corporation should be favored by our laws, to the injury of our own citizens, nor that it should be permitted to do, under cover of our laws, what the laws of its own country do not allow.

As the Wisconsin Supreme Court says: "The laws of the state are enacted, primarily, for the regulation, benefit and protection of persons, rights and property within its jurisdiction. To hold that two foreigners may import bodily a cause of action and insist, as a matter of right, that taxpayers, citizens and residents shall await the lagging steps of justice in the ante room, while the court hears and decides a foreign controversy, seems, on the face of it, to be unreasonable, if not absurd." (p. 54).

Counsel for plaintiff in error seek to extend what they call the doctrine of "comity" far beyond the meaning of any definition to be found in the books, and even beyond the limits of that "comity" between states of this Union, crystallized in the Constitution, viz: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Federal Constitution, Sec. 2, Art. 4.

Even under this provision of our Federal Constitution, no citizen of one state would be permitted, under cover of the laws of another state, to do that which the laws of its own sovereignty forbade.

We confess we are unable to see what the language of the trea-

ties between the United States and the Kingdom of Hanover, in 1840 and 1846, has to do with this case.

That portion of the treaty of 1828 between Prussia and the United States, which counsel contend applies to this case is contained in Article 1 and is quoted on page 13 of their brief. The side note to the article is "Reciprocal Liberty of Commerce" and the title of the treaty is "Treaty of Commerce and Navigation."

The language of Article 1 is as follows: "There shall be between territories of the high contracting parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective states shall mutually have the liberty to enter ports, places and rivers of the territories of each party, wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories in order to attend to their affairs; and they shall enjoy to that effect the same security and protection as the natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing."

This section evidently refers to personal security and protection, and certainly cannot be construed to mean that a foreign corporation, without even an agent sojourning or residing in this country, can snatch from the jurisdiction of our courts that property from which a domestic creditor is seeking to collect his dues.

The quotation on page 14 from the decision of this court in *Tucker vs. Alexandorf*, 183 U. S. 437, to the effect that treaties are solemn engagements and should be interpreted in a broad and liberal spirit "so far as it can be done without sacrifice of individual rights," and the quotation from Kent, Vol. 1, page 174. to the effect that treaties are to receive a fair and liberal interpretation, are admirable statements as to the correct interpretation of treaties, and we have no disposition to dispute them, but again, as always, counsel for plaintiff in error ignore the foundation of the Wisconsin decision, viz: that the primary object of our government is the protection of our own citizens.

A glance at the opinion of the Wisconsin Supreme Court will show that *Gardner vs. Thomas*, 14 Johnson 134, and the other

cases there cited abundantly sustain the principle to which they are cited by that court.

Counsel say: "None of these cases outrages justice by denying it to a party who cannot obtain it elsewhere." (Brief of plaintiff in error, p. 15.)

We might say that no case can be found in which justice was so outraged that a foreign corporation or non-resident alien was permitted to take property out of our jurisdiction into a foreign country, to the damage of a citizen of our country, or to accomplish indirectly, by the aid of our laws, what the laws of its own country forbid.

Counsel for plaintiff in error say: "The home creditor's claim accrued after debtor's property had been taken into the custody of the law, for the purpose of satisfying the foreigner's demand." (Brief p. 16.)

Again we quote the Wisconsin Supreme Court: "The question is not to be determined by priority of time any more than by priority of garnishment, but by the situation at the time the court is called upon to finally decide which creditor shall receive its aid. So, if the case were devoid of any other facts, comity would require that the interests of the home creditor be protected." (pp. 57, 58.)

Either the doctrine that it is the first duty of the government, through the courts and otherwise, to protect the rights of its citizens, both as to person and property, and not permit foreigners to injure them (as every court before whom the question has been brought has decided), is of value to our citizens, or, if counsel's contention is sustained, such an idea is a delusion and a snare.

If counsel's arguments are sound, any foreign creditor, who could manage to get an attachment upon property in this country belonging to a foreign debtor, or garnish its holder, before one of our citizens, to whom perhaps the foreigner might be indebted for the necessities of life, could obtain a lien on the property, our courts ought to permit the property to be taken from our country to a foreign land and our citizen, however meritorious his claim, referred to a foreign tribunal, for the enforcement of his rights. No court has ever held any such doctrine.

What difference does it make to defendant in error whether the controversy between foreigners is brought to our courts by choice or from necessity? For what purpose do we support a government? Why do we pay taxes, if it be not to the end that the government will protect our interests as against foreigners, through its judicial, as well as its other branches?

In conclusion of our reply to the first and second paragraphs in the argument of counsel for plaintiff in error we suggest, as a definition of "comity of nations," as applied to our courts, the following: "That judicial courtesy due to foreigners, when the interests of our own citizens are not thereby injuriously affected."

Mr. Justice Nott, in *Bailey vs. S. C. Ins. Co.*, 1 Nott & M. 453, defines "comity" as "respect, or what between individuals would be civility or politeness."

II.

The third paragraph of the argument of counsel for plaintiff in error is devoted to the contention that the Wisconsin Supreme Court is wrong when it says: "The foreign creditor is here nominally in his character as creditor, but really as the mere agent of the foreign trustee in bankruptcy, who could not himself come here and assert any right to the property. The creditor has agreed to hand over to the trustee, for general distribution, all that he may recover in this action. Thus, it is proposed, by the aid of our courts, to set at naught the policy of our own law, to the effect that a foreign trustee or receiver in involuntary bankruptcy proceedings obtains no title to debtor's property within this state," and that the plaintiff in error has the right to keep the proceeds of his action, if he can obtain any for himself, or the right to turn it over to the foreign trustee, for general distribution, notwithstanding the injury resulting to defendant in error. (Brief pp. 16, 18.)

In view of the agreement by which the trustee consents that the plaintiff in error may maintain the action in Wisconsin, notwithstanding the prohibition in the German statutes, in consid-

eration that the avails, if any, shall be turned over to the trustee, it is no wonder that counsel finds difficulty with his argument.

Counsels' position leads us to this conclusion: Either the plaintiff in error is seeking to obtain a preference as against other creditors of Terlinden, and thus evade the provisions of the bankruptcy code of its own country ,or else, by means of the agreement to merely represent the trustee, is attempting to avoid the effect of our laws and to accomplish what the trustee could not do directly.

III.

Counsels' last contention is that the Wisconsin decision "deprives the plaintiff of its property rights without due process of law," (Brief p. 18), and it is argued that plaintiff in error was not a party to the action between defendant in error and Terlinden and had no opportunity to defend against it and that because of the service of the garnishee summons on behalf of the plaintiff, the money garnished was the property of the plaintiff and that therefore the plaintiff has been "deprived of $7,500.00 with interest and costs."

Inasmuch as the action brought by defendant in error against Terlinden was brought, maintained and concluded in exact compliance with the laws of Wisconsin, his judgment was a valid judgment as to all the world.

Counsel state that Terlinden was, to the knowledge of defendant in error, a prisoner in Germany. (Brief p. 18.) Nothing of this appears in the record, but the statement having been made,. it may be proper to say that proof of the inability of defendant in error, after due diligence, to ascertain the postoffice address of Terlinden, was made to the court, as required by the Wisconsin statutes and the order for substituted service properly made thereon.

Moreover, the fact should not be lost sight of, though constantly avoided by counsel for plaintiff in error, that in the equity action brought by plaintiff in error against defendant in error,

The Marine National Bank, Ames and Terlinden, April 1, 1904, the answer of the defendant in error *does not set up any judgment, but alleges that Terlinden "is indebted to this defendant in the sum of $7,500, upon account, for services rendered by this defendant,* etc." (p. 78.)

The claim of defendant in error was not pleaded as a judgment at all, and as a matter of fact ,judgment on such claim was rendered June 11, 1904. How then can counsel state and repeat again and again, as they have in their various briefs in this matter, that plaintiff in error never had an opportunity to litigate the validity of the original claim of defendant in error? The fact that it never saw fit to do so and that the judgment in the equity suit has, so far as the record shows, been acquiesced in is sufficient evidence that plaintiff in error recognizes the justice of the claim.

As the Wisconsin court says: "At this very time (August 17, 1901), Terlinden was indebted to Mr. Umbreit, a citizen of our own state, in some amount, and evidently upon contract, for continuous service. There is nothing in the record to impeach the *bona fides* of that debt or service." (p. 57.)

As stated before, the two suits were consolidated and argued and decided together (p. 50) and these facts were all before the Wisconsin Supreme Court.

The fund in the bank did not become in any sense the property of plaintiff and its attempt to reach it, by the aid of our laws, was one which might or might not be acquiesced in by our courts.

The cases cited by counsel for plaintiff in error on page 19 of their brief as to what is "due process of law" have no application to this case.

In Re Ah Chung, 2 Fed. Rep. 733, the court held a law prohibiting Chinamen from fishing in Californian waters, while all other aliens were permitted to fish therein, was void, under the fourteenth amendment to the Federal Constitution, because it denied to one nation "the equal protection of the laws" and a violation of articles 5 and 6 of the treaty with China, providing that the Chinese should enjoy the same privileges, immunities and ex-

emptions as "are enjoyed by citizens or subjects of the most favored nation."

In Re Ah Fong, 3 Sawyer, 144, a law of California forbade the landing of lewd women from vessels from foreign ports until a bond had been furnished that they should not become public charges. An act of Congress provided that no charge should be imposed by any state upon an immigrant from a foreign country not equally imposed upon every person immigrating from any other foreign country. The court held the California act in conflict with the act of Congress and in violation of the "most favored nation" clause in the treaty with China, and also in violation of that part of the fourteenth amendment providing that no state shall deprive any person of the equal protection of the law.

In *Ah Kow vs. Nunan*, 5 Sawyer, 552, 562, the court held that an ordinance of San Francisco directed against the Chinese, requiring that the hair of all prisoners be cut to the length of one inch, was void, because imposing an additional punishment and violating the fourteenth amendment.

It it difficult to see what bearing these cases have upon this.

It is claimed that plaintiff in error obtained some sort of property right in the fund in the bank, by virtue of the garnishment, and the Wisconsin statute, Sec. 2768, Statutes of 1898, is quoted.

The statute provides that the garnishee after service "shall stand liable to the plaintiff to the amount of the property * * * * in his possession * * * belonging to the defendant * * * to the extent of his right or interest therein."

The Wisconsin Supreme Court, with both parties before it, properly held that as between the foreigner and the citizen, the former had no right and could obtain none, in and to the fund until the claim of the citizen was satisfied. Where is the lack of "due process of law?"

In conclusion, it is submitted that the Wisconsin Supreme Court correctly interpreted the doctrine of "comity of nations" when it decided that the Berlin bank, plaintiff in error, will not be permitted, with the aid of the courts of this country, to dis-

regard the provisions of the bankruptcy code of Germany, and moreover, correctly decided that non-resident aliens will not be permitted to remove from the jurisdiction of our courts the property of a non-resident alien debtor until all claims of our citizens be satisfied, and that there is no lack of "due process of law" in this case.

Dated October 21, 1907.

AUGUSTUS C. UMBREIT,
In *propria persona.*

JOSEPH B. DOE,
Counsel for Defendant in Error.

DISCONTO GESELLSCHAFT *v.* UMBREIT.

ERROR TO THE CIRCUIT COURT OF MILWAUKEE COUNTY (BRANCH NO. 1), STATE OF WISCONSIN.

No. 63. Argued December 10, 11, 1907.—Decided February 24, 1908.

It is too late to raise the Federal question on motion for rehearing in the state court, unless that court entertains the motion and expressly passes on the Federal question.

While aliens are ordinarily permitted to resort to our courts for redress of wrongs and protection of rights, the removal of property to another jurisdiction for adjustment of claims against it is a matter of comity and not of absolute right, and, in the absence of treaty stipulations, it is within the power of a State to determine its policy in regard thereto.

The refusal by a State to exercise comity in such manner as would impair the rights of local creditors by removing a fund to a foreign jurisdiction for administration does not deprive a foreign creditor of his property without due process of law or deny to him the equal protection of the law; and so held as to a judgment of the highest court of Wisconsin holding the attachment of a citizen of that State superior to an earlier attachment of a foreign creditor.

While the treaty of 1828 with Prussia has been recognized as being still in force by both the United States and the German Empire, there is nothing therein undertaking to change the rule of national comity that permits a country to first protect the rights of its own citizens in local property before permitting it to be taken out of its jurisdiction for administration in favor of creditors beyond its borders.

127 Wisconsin, 676, affirmed.

THE facts are stated in the opinion.

Mr. F. C. Winkler for plaintiff in error:

The Federal questions on both points were brought before the Supreme Court of the State and claim made under them in the argument for rehearing. The motion was denied and opinion rendered expressly overruling the claim based on the treaties and by necessary implication, also the claim based on the Constitution of the United States.

The rulings upon them are therefore subject to review. *McKay* v. *Kalyton*, 204 U. S. 458; *Leigh* v. *Green*, 193 U. S.

79; *Columbia Water Power Co.* v. *Columbia Street Railway Co.*, 172 U. S. 465.

The plaintiff's suit was brought under the statutes of Wisconsin. The defendant was in Wisconsin. The property attached had been brought by him and placed on deposit in the State of Wisconsin. No court in the world could exercise jurisdiction either over his person or over his property except the courts of Wisconsin. No statute debars an alien from seeking justice in Wisconsin courts where the protection of his rights requires it.

The plaintiff is denied the benefit of the proceedings and of its judgment because being a foreigner it has no rights in the State of Wisconsin except such as "comity," which is "good nature," will accord it. Even under the ruling of the state court that the right of the plaintiff to pursue its absconding debtor into this country and to invoke the latter's remedial processes against him rests upon the comity, it is, however, the comity of the sovereignty, not of the court. Wharton, Conflict of Laws, § 1*a*.

Comity cannot be given or withheld at will. Civilization demands its exercise where justice requires it. It cannot be denied, in whole or in part, except on clear, clean principles of justice.

Under the treaty between the United States and the Kingdom of Prussia, made in 1828, if a proper and liberal interpretation be given thereto, the plaintiff in error is entitled to the same standing in court as a citizen of the United States would be in a like case. Public Treaties (Govt. Printing Office, 1875), p. 656; *Tucker* v. *Alexandroff*, 183 U. S. 424, 437. The cases cited by the Supreme Court of Wisconsin, viz.: *Eingartner* v. *Illinois Steel Co.*, 94 Wisconsin, 70; *Gardner* v. *Thomas*, 14 Johnson, 134; *Johnson* v. *Dalton*, 1 Cowen, 543; *DeWitt* v. *Buchanan*, 54 Barb. 31; *Olsen* v. *Schierenberg*, 3 Daly, 100; *Burdick* v. *Freeman*, 120 N. Y. 421, can easily be distinguished from the case at bar.

The state court erred in stating that plaintiff sues as the

agent of a foreign trustee in bankruptcy. That trustee ha and claims no rights to the bankrupt's property in Wisconsi Foreign law does not operate on property beyond its jurisdic tion. *Segnitz* v. *G. C. Banking & Trust Co.*, 117 Wisconsi 171, 176.

The property in question was not transferred to the truste and that left its legal title in the debtor. The plaintiff being creditor brought suit on his own claim in his own right.

The circumstance that the creditor after suit commence promised to turn over the proceeds he should recover to th trustee for distribution does not impair his rights as a creditor

The course of the plaintiff in no way "sets at naught" th rule of our law that the trustee in bankruptcy does not obtai title to property in Wisconsin by reason of the proceedings i Germany. No claim is made on this score in the intervenor answer.

The decision of the Supreme Court of Wisconsin deprive the plaintiff of its property rights without due process of law in violation of the Constitution of the United States.

The judgment which the intervenor obtained, although i the form of the statute, is in point of fact no better than a *ex parte* affidavit. The defendant was to the intervenor knowledge a prisoner in Germany. The only notice given wa by publication of the summons in a Milwaukee paper. N copy of the summons and complaint was ever mailed to th defendant as required by § 2640, Statutes of Wisconsin.

The defendant Terlinden, when the intervenor's suit wa commenced against him, had not the slightest interest in th property sought to be reached. All his interest had passe to the plaintiff. The plaintiff was the only party adversel interested to the intervenor. It had an adjudicated lien goo against all the world (except the claim of the intervenor).

An alien, too, is entitled to due process of law under the Con stitution of the United States. *In re Ah Fung*, 3 Sawyer, 144 *Ah Kow* v. *Nunan*, 5 Sawyer, 562; *In re Ah Chung*, 2 Fed. Rep 733.

The judgment against Terlinden was, as against this plaintiff, absolutely without process of law. It adjudicated nothing. The plaintiff was not a party therein, nor was it notified, and it had no opportunity to defend against it.

Mr. Joseph B. Doe for defendant in error:

Domestic creditors will be protected to the extent of not allowing the property or funds of a non-resident debtor to be withdrawn from the State before domestic creditors have been paid. Every country will first protect its own citizens. *Catlin* v. *Silver Plate Co.*, 123 Indiana, 477; *Chafey* v. *Fourth Nat. Bank*, 71 Maine, 414, 524; *Bagby* v. *Railway Co.*, 86 Pa. St. 291; *Lycoming Fire Ins. Co.* v. *Wright*, 55 Vermont, 526; *Thurston* v. *Rosenfelt*, 42 Missouri, 474; *Willitts* v. *Waite*, 25 N. Y. 577.

Citizens and residents of the country where insolvency proceedings have been instituted are bound by such proceedings and cannot pursue the property of the insolvent debtor in another country. *Cole* v. *Cunningham*, 133 U. S. 107; *Linville* v. *Hadden*, 88 Maryland, 594; *Chafey* v. *Fourth Nat. Bank, supra; Einer* v. *Beste*, 32 Missouri, 240; *Long* v. *Girdwood*, 150 Pa. St. 413; *Bacon* v. *Horne*, 123 Pa. St. 452.

A creditor, by proving his claim in bankruptcy or any insolvency proceedings, submits to the jurisdiction of the court in which the proceeding is pending and cannot pursue his remedy elsewhere. *Clay* v. *Smith*, 3 Peters, 411; *Cooke* v. *Coyle*, 113 Massachusetts, 252; *Ormsby* v. *Dearborn*, 116 Massachusetts, 386; *Batchelder* v. *Batchelder*, 77 N. H. 31; *Wilson* v. *Capuro*, 41 California, 545; *Wood* v. *Hazen*, 10 Hun, 362.

Where both parties, plaintiff and defendant, are residents of a foreign State, the plaintiff cannot come into our country and obtain an advantage by our law which he could not obtain by his own.

If he seeks to nullify the law of his own State and asks our courts to aid him in so doing, he cannot have such assistance, if for no other reason than that it is forbidden by public policy

and the comity which exists between states and nations, which comity will always be enforced when it does not conflict with the rights of domestic citizens. *Bacon* v. *Horne, supra; In re Waite*, 99 N. Y. 433; *Bagby* v. *Railway Co., supra.*

Citizens of a foreign State or country will not be aided by the courts of this country to obtain, by garnishment, a preference of their claim against a foreign debtor, in disregard of proceedings in their own country for the sequestration of the debtor's estate and the appointment of a trustee thereof in bankruptcy. *Long* v. *Girdwood, supra.*

It is the uniform rule and doctrine of all courts that the principles of comity do not require that courts confer powers upon a foreign receiver or trustee in bankruptcy or permit him to bring and maintain actions in this State that interfere with and impair the rights of domestic creditors. *Humphreys* v. *Hopkins*, 81 California, 551; *Ward* v. *Pac. Mutual Life Ins. Co.*, 135 California, 235; *Hunt* v. *Columbian Ins. Co.*, 55 Maine, 290; *Pierce* v. *O'Brien*, 129 Massachusetts, 314; *Rogers* v. *Riley*, 80 Fed. Rep. 759; *Catlin* v. *Wilcox Silver Plate Co.*, 123 Indiana, 477.

MR. JUSTICE DAY delivered the opinion of the court.

The Disconto Gesellschaft, a banking corporation of Berlin, Germany, began an action in the Circuit Court of Milwaukee County, Wisconsin, on August 17, 1901, against Gerhard Terlinden and at the same time garnisheed the First National Bank of Milwaukee. The bank appeared and admitted an indebtedness to Terlinden of $6,420. The defendant in error Umbreit intervened and filed an answer, and later an amended answer.

A reply was filed, taking issue upon certain allegations of the answer, and a trial was had in the Circuit Court of Milwaukee County, in which the court found the following facts:

"That on the 17th day of August, 1901, the above-named plaintiff, the Disconto Gesellschaft, commenced an action in

this court against the above-named defendant, Gerhard Terlinden, for the recovery of damages sustained by the tort of the said defendant, committed in the month of May, 1901; that said defendant appeared in said action by A. C. Umbreit, his attorney, on August 19, 1901, and answered the plaintiff's complaint; that thereafter such proceedings were had in said action that judgment was duly given on February 19, 1904, in favor of said plaintiff, Disconto Gesellschaft, and against said defendant, Terlinden, for $94,145.11 damages and costs; that $85,371.49, with interest from March 26, 1904, is now due and unpaid thereon; that at the time of the commencement of said action, to wit, on August 17, 1901, process in garnishment was served on the above-named garnishee, First National Bank of Milwaukee, as garnishee of the defendant Terlinden.

"That on August 9, 1901, and on August 14, 1901, a person giving his name as Theodore Grafe deposited in said First National Bank of Milwaukee the equivalent of German money aggregating $6,420.00 to his credit upon account; that said sum has remained in said bank ever since, and at the date hereof with interest accrued thereon amounted to $6,969.47.

"That the defendant Gerhard Terlinden and said Theodore Grafe, mentioned in the finding, are identical and the same person.

"That the interpleaded defendant, Augustus C. Umbreit, on March 21, 1904, commenced an action in this court against the defendant Terlinden for recovery for services rendered between August 16, 1901, and February 1, 1903; that no personal service of the summons therein was had on the said defendant; that said summons was served by publication only and without the mailing of a copy of the summons and of the complaint to said defendant; that said defendant did not appear therein; that on June 11, 1904, judgment was given in said action by default in favor of said Augustus C. Umbreit and against said defendant Terlinden for $7,500 damages, no part whereof has been paid; that at the time of the commencement of said action process of garnishment was served, to wit, on March 22,

1904, on the garnishee, First National Bank of Milwaukee, as garnishee of said defendant Terlinden.

"That the defendant Terlinden at all the times set forth in finding number one was and still is a resident of Germany; that about July 11, 1901, he absconded from Germany and came to the State of Wisconsin and assumed the name of Theodore Grafe; that on August 16, 1901, he was apprehended as a fugitive from justice upon extradition proceedings duly instituted against him, and was thereupon extradited to Germany.

"That the above-named plaintiff, The Disconto Gesellschaft, at all the times set forth in the findings was, ever since has been and still is a foreign corporation, to wit, of Germany, and during all said time had its principal place of business in Berlin, Germany; that the above-named defendant, Augustus C. Umbreit, during all said times was and still is a resident of the State of Wisconsin.

"That on or about the 27th day of July, 1901, proceedings in bankruptcy were instituted in Germany against said defendant Terlinden, and Paul Hecking appointed trustee of his estate in such proceedings on said date; that thereafter, and on or after August 21, 1901, the above-named plaintiff, The Disconto Gesellschaft, was appointed a member of the committee of creditors of the defendant Terlinden's personal estate, and accepted such appointment; and that the above-named plaintiff, The Disconto Gesellschaft, presented its claim to said trustee in said bankruptcy proceedings; that said claim had not been allowed by said trustee in January, 1902, and there is no evidence that it has since been allowed; that nothing has been paid upon said claim; that said claim so presented and submitted is the same claim upon which action was brought by the plaintiff in this court and judgment given, as set forth in finding No. 1; that said action was instituted by said plaintiff, The Disconto Gesellschaft, through the German consul in Chicago; and that the steps so taken by the plaintiff, The Disconto Gesellschaft, had the consent and approval of Dr. Paul Hecking as trustee in bankruptcy, so appointed in the bank-

ruptcy proceedings in Germany, and that after the commencement of the same the plaintiff, The Disconto Gesellschaft, agreed with said trustee that the moneys it should recover in said action should form part of the said estate in bankruptcy and be handed over to said trustee; that, among other provisions, the German bankrupt act contained the following: 'Sec. 14, Pending the bankruptcy proceedings, neither the assets nor any other property of the bankrupt are subject to attachment or execution in favor of individual creditors.' "

Upon the facts thus found the Circuit Court rendered a judgment giving priority to the levy of the Disconto Gesellschaft for the satisfaction of its judgment out of the fund attached in the hands of the bank. Umbreit then appealed to the Supreme Court of Wisconsin. That court reversed the judgment of the Circuit Court, and directed judgment in favor of Umbreit, that he recover the sum garnisheed in the bank. 127 Wisconsin, 651. Thereafter a remittitur was filed in the Circuit Court of Milwaukee County and a final judgment rendered in pursuance of the direction of the Supreme Court of Wisconsin. This writ of error is prosecuted to reverse that judgment. At the same time a decree in an equity suit, involving a fund in another bank, was reversed and remanded to the Circuit Court. This case had been heard, by consent, with the attachment suit. With it we are not concerned in this proceeding.

No allegation of Federal rights appeared in the case until the application for rehearing. In this application it was alleged that the effect of the proceedings in the state court was to deprive the plaintiff in error of its property without due process of law, contrary to the Fourteenth Amendment, and to deprive it of certain rights and privileges guaranteed to it by treaty between the Kingdom of Prussia and the United States. The Supreme Court of Wisconsin, in passing upon the petition for rehearing and denying the same, dealt only with the alleged invasion of treaty rights, overruling the contention of the plaintiff in error. 127 Wisconsin, 676. It is well settled in this court that it is too late to raise Federal questions review-

able here by motions for rehearing in the state court. *Pim* v. *St. Louis*, 165 U. S. 273; *Fullerton* v. *Texas*, 196 U. S. 192; *McMillen* v. *Ferrum Mining Company*, 197 U. S. 343, 347; *French* v. *Taylor*, 199 U. S. 274, 278. An exception to this rule is found in cases where the Supreme Court of the State entertains the motion and expressly passes upon the Federal question. *Mallett* v. *North Carolina*, 181 U. S. 589; *Leigh* v. *Green*, 193 U. S. 79.

Conceding that this record sufficiently shows that the Supreme Court heard and passed upon the Federal questions made upon the motion for rehearing, we will proceed briefly to consider them.

The suit brought by the Disconto Gesellschaft in attachment had for its object to subject the fund in the bank in Milwaukee to the payment of its claim against Terlinden. The plaintiff was a German corporation and Terlinden was a German subject. Umbreit, the intervenor, was a citizen and resident of Wisconsin. The Supreme Court of Wisconsin adjudged that the fund attached could not be subjected to the payment of the indebtedness due the foreign corporation as against the claim asserted to the fund by one of its own citizens, although that claim arose after the attachment by the foreign creditor; and, further, that the fact that the effect of judgment in favor of the foreign corporation would be, under the facts found, to remove the fund to a foreign country, there to be administered in favor of foreign creditors, was against the public policy of Wisconsin, which forbade such discrimination as against a citizen of that State.

Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights. 4 Moore, International Law Digest, § 536, p. 7; Wharton on Conflict of Laws, § 17.

But what property may be removed from a State and subjected to the claims of creditors of other States, is a matter of comity between nations and states and not a matter of abso-

lute right in favor of creditors of another sovereignty, when citizens of the local state or country are asserting rights against property within the local jurisdiction.

"'Comity,' in the legal sense," says Mr. Justice Gray, speaking for this court in *Hilton* v. *Guyot*, 159 U. S. 113, 163, "is neither a matter of absolute obligation on the one hand nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows in its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

In the elaborate examination of the subject in that case many cases are cited and the writings of leading authors on the subject extensively quoted as to the nature, obligation and extent of comity between nations and states. The result of the discussion shows that how far foreign creditors will be protected and their rights enforced depends upon the circumstances of each case, and that all civilized nations have recognized and enforced the doctrine that international comity does not require the enforcement of judgments in such wise as to prejudice the rights of local creditors and the superior claims of such creditors to assert and enforce demands against property within the local jurisdiction. Such recognition is not inconsistent with that moral duty to respect the rights of foreign citizens which inheres in the law of nations. Speaking of the doctrine of comity, Mr. Justice Story says: "Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded." Story on Conflict of Laws, § 33.

The doctrine of comity has been the subject of frequent discussion in the courts of this country when it has been sought to assert rights accruing under assignments for the benefit of creditors in other States as against the demands of local creditors, by attachment or otherwise in the State where the property is situated. The cases were reviewed by Mr. Justice Brown,

delivering the opinion of the court in *Security Trust Company* v *Dodd, Mead & Co.*, 173 U. S. 624, and the conclusion reache that voluntary assignments for the benefit of creditors shoul be given force in other States as to property therein situate except so far as they come in conflict with the rights of loca creditors, or with the public policy of the State in which it i sought to be enforced; and, as was said by Mr. Justice McLea in *Oakey* v. *Bennett*, 11 How. 33, 44, "national comity does no require any government to give effect to such assignment [fo the benefit of creditors] when it shall impair the remedies o lessen the securities of its own citizens."

There being, then, no provision of positive law requiring th recognition of the right of the plaintiff in error to appropriat property in the State of Wisconsin and subject it to distribu tion for the benefit of foreign creditors as against the demand of local creditors, how far the public policy of the State per mitted such recognition was a matter for the State to deter mine for itself. In determining that the policy of Wisconsi would not permit the property to be thus appropriated to th benefit of alien creditors as against the demands of the citizen of the State, the Supreme Court of Wisconsin has done no mor than has been frequently done by nations and states in re fusing to exercise the doctrine of comity in such wise as to im pair the right of local creditors to subject local property t their just claims. We fail to perceive how this application o a well known rule can be said to deprive the plaintiff in erro of its property without due process of law.

Upon the motion for rehearing the plaintiff in error called attention to two alleged treaty provisions between the Uni ted States and the Kingdom of Prussia, the first from the treaty of 1828, and the second from the treaty of 1799. As to the last mentioned treaty the following provision was referred to:

"Each party shall endeavor by all the means in their power to protect and defend all vessels and other effects belonging to the citizens or subjects of the other, which shall be within the extent of their jurisdiction by sea or by land."

The treaty of 1799 expired by its own terms on June 2, 1810, and the provision relied upon is not set forth in so much of the treaty as was revived by article 12 of the treaty of May 1, 1828. See Compilation of Treaties in Force, 1904, prepared under resolution of the Senate, pp. 638 *et seq.* If this provision of the treaty of 1799 were in force we are unable to see that it has any bearing upon the present case.

Article one of the treaty of 1828 between the Kingdom of Prussia and the United States is as follows:

"There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective states shall mutually have liberty to enter the ports, places and rivers of the territories of each party wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs; and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing."

This treaty is printed as one of the treaties in force in the compilation of 1904, p. 643, and has undoubtedly been recognized by the two governments as still in force since the formation of the German Empire. See *Terlinden* v. *Ames*, 184 U. S. 270; Foreign Relations of 1883, p. 369; Foreign Relations of 1885, pp. 404, 443, 444; Foreign Relations of 1887, p. 370; Foreign Relations of 1895, part one, 539.

Assuming, then, that this treaty is still in force between the United States and the German Empire, and conceding the rule that treaties should be liberally interpreted with a view to protecting the citizens of the respective countries in rights thereby secured, is there anything in this article which required any different decision in the Supreme Court of Wisconsin than that given? The inhabitants of the respective countries are to be at liberty to sojourn and reside in all parts whatsoever of said territories in order to attend to their affairs, and they shall enjoy, to that effect, the same security and protection as

the natives of the country wherein they reside, upon submission to the laws and ordinances there prevailing. It requires very great ingenuity to perceive anything in this treaty provision applicable to the present case. It is said to be found in the right of citizens of Prussia to attend to their affairs in this country. The treaty provides that for that purpose they are to have the same security and protection as natives in the country wherein they reside. Even between States of the American Union, as shown in the opinion of Mr. Justice Brown in *Security Trust Co.* v. *Dodd, Mead & Co.*, 173 U. S., *supra*, it has been the constant practice not to recognize assignments for the benefit of creditors outside the State, where the same came in conflict with the rights of domestic creditors seeking to recover their debts against local property. This is the doctrine in force as against natives of the country residing in other states, and it is this doctrine which has been applied by the Supreme Court of Wisconsin to foreign creditors residing in Germany. In short, there is nothing in this treaty undertaking to change tne well-recognized rule between states and nations which permits a country to first protect the rights of its own citizens in local property before permitting it to be taken out of the jurisdiction for administration in favor of those residing beyond their borders.

The judgment of the Circuit Court of Milwaukee County entered upon the remittitur from the Supreme Court of Wisconsin is

Affirmed.